Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PAOLO LODUCA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY
MATTHEW J. HERRINGTON
WILLIAMS & CONNOLLY
725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

JAMES W. SHANNON, JR.
Crown Quadrangle, Rm. 132
Stanford, California 94305
(415) 723-2511

Attorneys for Petitioner Paolo LoDuca

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Is Article III the exclusive constitutional source of power for federal judges to adjudicate the extradition of United States citizens to foreign countries?

2. Does the extradition statute, which subjects the decisions of federal judges to the plenary review and revision of the Secretary of State, violate the separation of powers and Article III?

3. Does Article III require that a proceeding to extradite a United States citizen be heard and decided by an Article III court, rather than by delegation to a magistrate whose decisions are neither subject to judicial supervision during the proceeding nor to review on direct appeal?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case August 29, 1996.

OPINIONS BELOW

The opinion of the federal magistrate judge is unreported and is at Appendix ("A.') 56a. The opinion of the District Court is unreported and is at A. 26a. The opinion of the Court of Appeals affirming the District Court is not yet reported and is at A. 1a.

JURISDICTION

The judgment of the federal magistrate judge was entered November 17, 1994. The purported jurisdictional basis for that judgment was 18 U.S.C. § 3184. The judgment of the United States District Court for the Eastern District of New York was entered July 12, 1995. The

jurisdictional basis for that judgment was 28 U.S.C. § 2241(a). A timely notice of appeal was filed July 17, 1995. The judgment of the United States Court of Appeals for the Second Circuit affirming the District Court was entered August 29, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND TREATY INVOLVED

Pertinent provisions of Article I, Article III, 18 U.S.C. §§ 3184, 3186 and the Extradition Treaty Between the United States and the Republic of Italy are at A. 65a.

STATEMENT OF THE CASE

Mr. Paolo LoDuca is a 56 year-old citizen of the United States who is the subject of an extradition request that seeks to have him delivered to Italy to face a nineteen-year prison sentence, imposed *in absentia*, for alleged violations of Italian law.[1] On May 26, 1994, a complaint was filed in the United States District Court for the Eastern District of New York. The extradition statute, 18 U.S.C. § 3184, was the only basis for subject-matter jurisdiction offered in the Complaint; that statute provides for extradition cases to be heard and decided by "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." See A. 67a.

After a hearing, a federal magistrate judge "certif[ied]" to the Secretary of State "that he deemed the evidence sufficient to sustain the charge" against petitioner. 18 U.S.C. § 1384. Although a federal judge had issued his final decision, the Secretary of State, as the Second Circuit found, nonetheless had "final authority" and "plenary discretion" under the statute to decide whether or not to

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[1] The Second Circuit stated that Mr. LoDuca is an Italian citizen. A. 2a. As the government conceded below, Mr. LoDuca is a United States citizen. A. 63a.

abide by the judge's ruling. A. 5a-6a (citing 6 M. Whiteman, *Digest of International Law* 1046 (1968) ("the judicial branch cannot, as a matter of domestic law bind the executive to grant extradition")). See *LoBue* v. *Christopher*, 893 F. Supp. 65, 68 (D.D.C. 1995) ("The text of the [extradition] statute, the consistent manner in which it has been interpreted by all three branches of government, and historical practice confirm that the answer is clearly yes—the statute does purport to give the Secretary of State the authority to review the legal findings of extradition judges."), *vacated on other grounds*, 82 F.3d 1081 (D.C. Cir. 1996).

Petitioner then sought a writ of habeas corpus under 28 U.S.C. § 2241 in the District Court. That writ was refused, and petitioner appealed to the Second Circuit. In his brief before that court, petitioner argued that the extradition statute was unconstitutional as a violation of Article III, the separation of powers and the Appointments Clause. If federal courts adjudicate extradition cases pursuant to Article I, he argued, the statute violates Article III, which is the sole constitutional source for federal courts and judges to adjudicate a case or controversy; neither Article I nor Article II is a constitutional substitute. See, *e.g.*, *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996). If, on the other hand, federal judges adjudicate extradition cases pursuant to Article III, he argued, the statute is unconstitutional for two independent reasons: it requires federal judges to issue nonbinding, unenforceable advisory opinions, which are subject to the review and revision of the Secretary of State; and the total, unsupervised delegation of extradition proceedings to magistrates violates Article III, the separation of powers and due process. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792); *Gordon* v. *United States*, 117 U.S. 697, 702 (1865); *Gomez* v. *United States*, 490 U.S. 858 (1989).

The Second Circuit—in an effort to avoid both the Scylla of impermissibly expanding the jurisdiction of

federal courts under Article I and the Charybdis of executive revision—rendered two related holdings. First, that the extradition statute granted Article I adjudicatory power to federal *judges*, and not Article III adjudicatory power to federal courts. A. 16a. Second, that Article III judges may constitutionally exercise Article I adjudicatory power, without violating Article III, the separation of powers or the Appointments Clause. A. 15a-21a. Finally, the Second Circuit also held that magistrates in extradition cases exercise an "independent grant of authority," A. 18a, thereby rejecting petitioner's claim that the unsupervised delegation to a magistrate of an extradition case involving the liberty of a United States citizen violates Article III and due process.

REASONS FOR GRANTING THE WRIT

1. The Second Circuit held that federal judges may constitutionally adjudicate an extradition case "in a non-Article III capacity" and that, as Article I offiices, they "do not exercise Article III power" and thus "are not bound by the limits of Article III." A. 8a, 12a n.6, 17a. The First and Eleventh Circuits share this extraordinary conclusion regarding federal court jurisdiction. See *In re Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993); *Martin* v. *Warden*, 993 F.2d 824, 828 (11th Cir. 1993). This notion—that federal judges may adjudicate a case or controversy pursuant to Article I—can be reconciled neither with this Court's "unvarying approach to Article III as setting forth the exclusive catalog of permissible federal court jurisdiction"; nor its essential corollary, that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 116 S. Ct. at 1128, 1132 (citation omitted). If federal judges may adjudicate a case or controversy pursuant to Article I, the jurisdictional limitations imposed by Article III are meaningless.

2. The lower courts are deeply confused and inconsistent in dealing with the jurisdictional basis for adjudicating

extradition cases. The Second, First and Eleventh Circuits have held that extradition proceedings are conducted pursuant to Article I. This Court, a number of district courts, and the federal government have all said that extradition proceedings are conducted pursuant to Article III. *In re Kaine*, 55 U.S. (14 How.) 103 (1852); *In re Lin*, 915 F. Supp. 206 (D. Guam 1995); *In re Lang*, 905 F. Supp. 1385 (C.D. Cal. 1995); *In re Sutton*, 905 F. Supp. 631 (E.D. Mo. 1995); *Carreno* v. *Johnson*, 899 F. Supp. 624 (S.D. Fla. 1995).[2] For its part, the Ninth Circuit has suggested such proceedings are conducted pursuant to Article II. *In re Smythe*, 61 F.3d 711, 714 (9th Cir. 1996) (asserting jurisdiction directly under treaty), *cert. denied*, 116 S. Ct. 2558 (1996). In addition, though all three branches of the federal government agree that the statute provides for executive revision, see *LoBue*, 893 F. Supp. at 68, numerous lower courts nonetheless have held that the statute does not provide for executive review. See, *e.g.*, *Lin*, 915 F. Supp. 206; *Lang*, 905 F. Supp. 1385; *Sutton*, 905 F. Supp. 631; *Carreno*, 899 F. Supp. 624.

3. The Second Circuit also held that an extradition proceeding, in which a citizen can be not only stripped of his liberty but also sent out of this country and placed beyond the protection of its laws, is so inconsequential that it does not require hearing and decision by an Article III court, and that magistrates have an "independent grant of authority" to decide the matter themselves. A. 18a. That premise is untenable, and the Second Circuit's decision is in conflict with the recent decisions of this Court on the permissible role of magistrates under Article III, especially *Gomez* v. *United States*, 490 U.S. 858 (1989).

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[2] In its briefs before the United States District Court for the District of Columbia, the government "agreed that federal extradition judges act in their official judicial capacities," *LoBue*, 893 F. Supp. at 75, and thus necessarily exercise "the Judicial Power" of Article III. See A. 96a.

I. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DECISIONS HOLDING THAT ARTICLE III IS THE EXCLUSIVE SOURCE OF FEDERAL JURISDICTION.

In a series of cases, of which *Seminole Tribe* is the most recent, this Court has declared both its "unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal court jurisdiction" and that approach's essential corollary, that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 116 S. Ct. at 1128, 1132 (emphasis original). Here the Court of Appeals has held that Article III judges are "not bound by the limits of Article III" when they adjudicate an extradition case, because they do so "in a non-Article III capacity." A. 12a n.6, 17a. That extraordinary holding—based on an unwarranted reading of the extradition statute and reached to avoid the plain unconstitutionality of that statute—conflicts with two centuries of decisions by this Court setting the permissible scope of federal jurisdiction under Article III.

A. The Court of Appeals' Interpretation of the Extradition Statute Conflicts with its Text and with this Court's Precedents.

After first asserting that "it is not so clear that the original language of the statute should control" its interpretation, the Second Circuit held that the extradition statute granted Article I adjudicatory power, and not "judicial power under Article III of the Constitution," to federal judges. A. 14a n.8, 15a. That holding conflicts with the statute's plain meaning and with this Court's precedents.

1. The extradition statute enacted in 1848 expressly declared that federal judges were "hereby severally vested with power, jurisdiction, and authority" over extradition proceedings. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302, 302. A. 69a. The extradition statute necessarily was a specific jurisdictional grant, because the general federal

question statute, giving federal courts jurisdiction over cases "arising under" the Constitution, treaties and federal law, was not enacted until 1875. See Act of March 3, 1875, 18 Stat. 470.[3] "Jurisdiction" is, by definition, something given to judges in their official capacity, not in their private capacity.[4] The Second Circuit itself admitted that federal judges conducting extradition proceedings "certainly appear to exercise judicial power." A. 12a n.6.

The Second Circuit considered "dispositive" the statute's language granting jurisdiction to "any justice or judge," and not expressly to federal courts. A. 16a. The phrase, "any justice or judge," does not imply, however, that federal judges act in their individual capacities, as this Court's precedents make clear. *See In re United States*, 194 U.S. 194, 196-97 (1904) ("court" and "judge" are interchangeable terms); *Chin Bak Kan* v. *United States*, 186 U.S. 193 (1902).

2. The legislative history confirms that the extradition statute was meant to provide a specific grant of subject-matter jurisdiction. The statute was enacted in response to *In re Metzger*, 46 U.S. (5 How.) 176, 181 (1847), in which this Court held it had no jurisdiction to review a dis-

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[3] During the first codification of the Statutes at Large, the phrase "hereby severally vested with power, jurisdiction, and authority" was silently excised by the codifiers. *Compare id. with* Rev. Stat., tit. 67, § 5270, at 1026 (1st ed. 1875). That phrase was likely omitted as surplusage because the general federal question statute had just been enacted, and a specific grant of jurisdiction must have seemed unnecessary to the codifiers. The phrase remains missing from the current version of the extradition statute published in the United States Code. See 18 U.S.C. § 3184. It is settled law, however, that "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); *United States* v. *Ryder*, 110 U.S. 729, 740 (1884) (same).

[4] Where a federal judge is empowered in his extrajudicial capacity, he is merely "authorized and directed" to perform some task. See Act of March 3, 1849, ch. 181, 9 Stat. 788; *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852).

trict court's issuance of a warrant of extradition, because the district court was not acting pursuant to a jurisdictional statute, but instead "at chambers" without any jurisdictional basis. *Id.* at 191.

Responding to the jurisdictional problem identified by *Metzger*, Senator Dayton proposed on July 28, 1848 that the extradition statute be passed, explaining that the statute was necessary because the *Metzger* case "was brought to the United States Supreme Court, where it was refused to be considered because Judge Betts heard the case in chambers, and the Supreme Court held it had no jurisdiction in the case." Cong. Globe, 30th Cong., 1st Sess. 1008 (July 28, 1848). A. 88a. Only the strangest alchemy could transmute a statute that was intended to create jurisdiction in federal courts into one that conferred Article I power.

3. In interpreting the extradition statute to grant Article I, and not Article III, adjudicatory power to federal judges, the Second Circuit disregarded two Supreme Court cases, in favor of a dissent in one of those cases. A. 8a. The dissent was that of Justice Curtis in *In re Kaine*: "strictly speaking," he wrote, an extradition judge "does not exercise any part of the judicial power of the United States." 55 U.S. at 120. See *In re Howard*, 996 F.2d at 1325 (relying on same); *Martin*, 993 F.2d at 828 (same). Justice Curtis was alone on this point. The other seven Justices, four in a plurality and three otherwise in dissent, all agreed that the extradition statute vested judges in their judicial capacity. See 55 U.S. at 109-11, 117 (plurality opinion) (refusing writ on merits); *id.* at 135, 140 (Nelson, J., dissenting) (urging grant of writ on merits).

There should be no doubt that the *Kaine* majority held that the extradition statute provided an Article III grant of jurisdiction. Without some such grant, the Court would not have been able to exercise its appellate jurisdiction, as had been the case in *Metzger*. The only difference between

1847, when *Metzger* was decided, and 1853, when *Kaine* was decided, was the enactment in 1848 of the extradition statute. With that statute, there was federal court jurisdiction; without it, there was not.

The opinions in *Kaine* reaffirmed this Court's prior unanimous holding that a district court acted "in a judicial capacity" when determining whether the evidence was sufficient to support an extradition warrant issued under the first international extradition treaty. *United States* v. *Lawrence*, 3 U.S. (3 Dall.) 42, 53 (1795). From the very beginning, the determination whether an individual was extraditable was understood to be a judicial function.[5]

B. The Court of Appeals' Decision Conflicts with *Seminole Tribe* v. *Florida*.

Article III is the exclusive source of power for federal courts to adjudicate a case or controversy. An unbroken phalanx of this Court's cases so holds. See, *e.g.*, *Seminole Tribe*, 116 S. Ct. 1114; *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The Second Circuit, "without questioning these cases," nonetheless held that the extradition statute is a permissible grant of Article I adjudicatory power to federal judges—because, it said, the statute empowered federal judges in their individual capacities, and not as a court. A. 15a-17a. The Second Circuit's judge-court distinction is patently empty. It eviscerates the limits of Article III, transforming it:

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[5] The same conclusion was reached in *United States* v. *Robins*, 27 F. Cas. 825, 833 (D.S.C. 1799) (No. 16175), in which the court held that extradition was a matter for the Judiciary under Article III. Relying on *United States* v. *Fong Yue Ting*, 149 U.S. 698 (1893), the Second Circuit erroneously arrived at the opposite conclusion—that the Executive has plenary authority to extradite. A. 5a n.2. But *Fong Yue Ting* concerned executive authority to exclude undesirable aliens, not authority to extradite United States citizens.

> from a comprehensive description of the permissible scope of federal judicial authority to a mere default disposition, applicable unless and until Congress prescribes more expansive authority in the exercise of one of its Article I powers. That is not the regime the Constitution establishes.

Pennsylvania v. *Union Gas Co.*, 491 U.S. 1, 40 (1989) (Scalia, J., dissenting).

1. The rule that Article III defines the boundaries of "the judicial Power" that Congress may vest in federal courts has its roots in *Marbury* v. *Madison*, which rejected the notion that Congress could "assign original jurisdiction to [the Supreme Court] in other cases than those specified" in Article III. 5 U.S. (1 Cranch) at 174. The logic of *Marbury* compels the same conclusion in defining the jurisdiction of inferior federal courts. The catalogue of Article III cases or controversies for inferior courts would be "mere surplusage," "entirely without meaning" and "form without substance," if Congress could ignore it in fixing federal jurisdiction. *Id.*[6]

This very point was dramatically made in *Tidewater*, when it was challenged by Justice Jackson, but endorsed by six other Justices. In three separate opinions, the other six Justices expressly and emphatically rejected Justice Jackson's position. As Justice Frankfurter later explained:

> a majority of the Court recognized that Article III defined the bounds of valid jurisdictional legislation and rejected the notion that jurisdictional grants can go outside those limits.

Textile Workers v. *Lincoln Mills*, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting). See *Tidewater*, 337

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[6] Later cases make the same point. *Hodgson* v. *Bowerback*, 9 U.S. (5 Cranch) 303, 304 (1809); *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234-35 (1922). *See also Ex parte Bakelite Corp.*, 279 U.S. 438, 490 (1929); *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Karcher* v. *May*, 484 U.S. 72, 77 (1987).

U.S. at 607 (Rutledge, J.); *id.* at 630, 637-38 (Vinson, C.J.); *id.* at 647-49 (Frankfurter, J.). The Second Circuit's decision, like Justice Jackson's idiosyncratic view, endorses an unconstitutional jurisdictional grant outside the limits of Article III.

C. The Court of Appeals' Decision Relies on an Empty Distinction Between Judges and Courts.

Just last Term, this Court reaffirmed the exclusivity of Article III: "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 116 S. Ct. at 1132. If the constitutional rule were otherwise, and labeling adjudicators "judge" and not "court" meant that "they are not bound by the limits of Article III," A. 17a, the defects of the statutes at issue in *Tidewater* and *Seminole Tribe* could have been cured by a simple substitution of words.

This Court has rejected such easy semantic evasions of Article III. In *Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267 (1991), United States Congressmen purported to sit on an airport commission in their individual capacities and not as Congressmen. This Court refused to indulge that sham, noting that "separation-of-powers analysis does not turn on the labeling of an activity," and holding that the "facts belie the *ipse dixit* that the [congressional] Board members will act 'in their individual capacities.'" *Id.* (quoting *Mistretta* v. *United States*, 488 U.S. 361, 393 (1989)).

Further, the Second Circuit's judge-court distinction relied heavily on an historical error. The Second Circuit apparently believed that two Supreme Court Justices accepted the role of Article I commissioners under the statute declared unconstitutional in *Hayburn's Case*. The court regularly repeated this canard. See A. 10a, 12a n.6, 13a, 17a. In fact, as the unreported case of *United States* v. *Yale Todd* recounts:

> It would seem, therefore, to have been unanimous, and that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that the power given in the Act of 1792 to the Circuit Court as a court, could not be construed to give it to the judges out of court as commissioners . . . . [A]s the act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

United States v. *Ferreira*, 54 U.S. (13 How.) 40, 53 (1852) (as appendix thereto). The principal authority relied on by the Second Circuit actually undermines its decision.

D. The Court of Appeals' Decision Conflicts with *Mistretta* v. *United States*.

The only extrajudicial activity allowed federal judges by the Constitution is non-adjudicatory, voluntary work in which the Judiciary's reputation for neutrality is not co-opted by one of the political branches. The Second Circuit's decision, allowing federal judges to preside over extradition proceedings in an extrajudicial capacity, satisfies none of *Mistretta*'s criteria.

1. This Court was careful in *Mistretta* to preserve Article III's status as the exclusive source of authority for federal judges to adjudicate a case or controversy when it emphasized that the Sentencing Commission exercised "not judicial power," but "administrative power." *Id.* at 404. Federal judges serving on the Commission "assume a wholly administrative role." *Id.* Those judges were *not* adjudicating a case or controversy, as they obviously do in extradition cases. This Court has never approved the grant of adjudicatory power to federal judges pursuant to any provision other than Article III, and *Mistretta* allows no exception.

2. This Court next determined that service on the Sentencing Commission was "voluntary." *Id.* at 405. The voluntariness of a federal judge's extrajudicial activity is a crucial bulwark against encroachment on the integrity of the Judicial Branch. Indeed, if Congress could require extrajudicial work of federal judges, it could indirectly control their dockets, their compensation, their responsibilities—and so their independence.

Congress has given federal judges no choice whether to hear extradition cases. They must preside in the cases assigned them. This involuntariness is particularly unsettling because, as we explain below, extradition judges have been given no appointment to act as executive officers, and therefore have been given no opportunity to decline the appointment as inconsistent with their judicial office.

3. The third *Mistretta* inquiry is whether the extrajudicial activity "undermines public confidence in the disinterestedness of the Judicial Branch." *Id.* at 407. The federal courts' "reputation for impartiality and nonpartisanship" cannot be "borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Id.* The Constitution prohibits Congress from requiring the Judiciary to perform extrajudicial work for the Executive, so as to give that work the appealing glow of judicial impartiality. As the Second Circuit observed, an extradition judge appears "essentially neutral" and undertakes tasks "virtually identical" to those performed by Article III judges every day. A. 20a. But this is precisely what *Mistretta* bars: Congress cannot co-opt the reputation and workings of federal judges while reserving to the Executive a veto over their decisions.

E. The Court of Appeals' Decision Conflicts With This Court's Appointments Clause Cases.

The Second Circuit, with some acrobatics, held that extradition is a sufficiently "non-judicial task" to satisfy Article III and yet a sufficiently "judicial task" to satisfy the Appointment Clause. A. 21a n.11. This "perhaps unique" circumstance, *id.*, in which the same adjudication is both judicial and nonjudicial, conflicts with this Court's Appointments Clause cases.

If federal judges do not preside over extradition proceedings pursuant to Article III, as the Second Circuit held, their actions offend the Appointments Clause, which requires that all "Officers of the United States" be appointed in accordance with its terms. U.S. Const. art. II, § 2, cl. 2. See *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976). Extradition judges are not appointed as executive officers in accordance with the Appointments Clause, and yet they are certainly "Officers of the United States" within the meaning of Article II. That designation includes "all persons who can be said to hold an office under the government." *Id.* at 126 (noting that a postmaster first class and a clerk of a district court are such officers). That extradition judges are authorized to order the imprisonment of United States citizens is surely enough to prove the point.

The Constitution requires federal judges performing an executive function in an extrajudicial capacity to possess a separate, executive appointment.[7] The federal judges serving on the Sentencing Commission were given such an appointment by the President, in addition to their judicial appointment. See 28 U.S.C. § 991(a); *Mistretta*, 480 U.S. at 404. Their judicial appointment alone is insufficient.

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[7] The extradition statute itself does not provide federal extradition judges with a proper appointment. This Court has squarely rejected the notion that a congressional statute could play such a role for judicial or executive officers. *Id.* at 124-37.

The point was made long ago in *United States* v. *Ferreira,* in which a federal district judge sat in his extra-judicial capacity to "adjust" the claims of Spanish inhabitants of Florida injured by United States action during the Spanish-American War. 54 U.S. at 46. The federal judge was to "report" his findings to the Secretary of the Treasury, who could refuse payment. *Id.* at 47. Following *Hayburn's Case,* the *Ferreira* court concluded that the federal judge's powers, which were subject to review and revision by the Secretary of the Treasury, were not "judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States," because the matter was "altogether *ex parte,*" with "no suit . . . no parties . . . no process." *Id.* at 46-48. Such a claims-adjusting function is "entirely alien to the legitimate functions of a judge or court"; and therefore the Court had no appellate jurisdiction to hear the case. *Id.* at 51-52. A proper appointment as an executive officer was required; otherwise, the judge rendered "void" decisions. *Id.* Similarly, when extradition judges preside without a separate executive appointment, they too render "void" decisions in violation of the Appointments Clause.

II. AS THE COURT OF APPEALS ACKNOWLEDGED, THE EXTRADITION STATUTE ALLOWS THE EXECUTIVE TO REVIEW AND REVISE THE DECISIONS OF FEDERAL JUDGES.

The Second Circuit acknowledged that the decisions of judges presiding over extradition proceedings are subject to executive revision. A. 12a. That point could hardly be denied. All three branches agree that the Secretary of State reviews and revises decisions in extradition cases. *Ornelas* v. *Ruiz,* 161 U.S. 502, 508 (1896); S. Rep. No. 82, 47th Cong. 1st Sess. 3 (1882); 17 U.S. Op. Att'y Gen. 184, 185-86 (1881); 3 Dep't. State Legal Advisor Op. 2356, 2367 (1931). See *LoBue,* 893 F. Supp. at 68-70. The Second Circuit avoided the plain uncon-

stitutionality of that practice by construing the extradition statute as providing Article I, not Article III, adjudicatory power. Behind that gambit stands the hard truth: the extradition statute requires federal judges to issue nonbinding, unenforceable advisory opinions, which are subject to the review and revision of the Secretary of State, in violation of Article III. See *LoBue*, 893 F. Supp. 65.

The statute is unconstitutional because it requires the Judiciary to render advisory opinions—judgments that are not binding and conclusive on the parties and for which there is no effective judicial enforcement. Article III precludes the Judiciary from carrying out "any duties, but such as are properly judicial." *Hayburn's Case*, 2 U.S. at 410. And "the judicial Power" vested in the Judiciary by Article III, § 1, is limited to the power to "render dispositive judgments." *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1453 (1995) (citation omitted). The oddities of extradition judgments—which posesss no *res judicata* effect,[8] cannot be judicially enforced, and instead constitute non-binding "certifications" to a Cabinet Secretary—require the courts to play a role that "is not judicial." *Hayburn's Case*, 2 U.S. at 410.

The statute also violates Article III and the separation of powers by allowing the Secretary to review the decisions of extradition judges. "Congress cannot vest review of the decisions of Article III courts in officials of the executive Branch." *Plaut*, 115 S. Ct. at 1453. Because the Constitution vests "the judicial Power" exclusively in the Judiciary, neither the Executive Branch nor Congress may act as a "court of errors," *Hayburn's Case*, 2 U.S. at 410, by reviewing judicial judgments. In violation of the separation of powers and Article III, which is the core textual embodiment of that principle, the extradition statute requires federal judges to issue "dead letter" judgments,

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[8] See *LoBue*, 893 F. Supp. at 71 (explaining that a determination of non-extraditability has no *res judicata* effect).

Gordon v. *United States*, 117 U.S. 697, 702 (1865), without force or effect.

Under the extradition statute, as in *Hayburn's Case*, *Gordon*, *and Ferreira*, federal judges are made to "certify" their final decisions to a Cabinet Secretary, who is not bound by those decisions, and who can accept or reject them as he pleases. That practice violates "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). This Court has never approved a statute that denies courts the final word over the cases and controversies brought before them.

III. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DECISIONS LIMITING THE DUTIES OF MAGISTRATES.

The Second Circuit held that even though a magistrate may not preside at criminal jury selection, may not decide a suppression motion, and may not hear a civil or misdemeanor case without consent—nevertheless, a magistrate, without any judicial supervision, and subject to no direct appeal, may hear all the evidence, make all the factual findings and legal rulings, and determine without plenary review whether a United States citizen can be sent out of this country and removed possibly forever from the protection of its laws. This decision cannot be reconciled with the past ten years of this Court's jurisprudence on Article III and the limited role of magistrates, nor with even older established holdings on the requirements of due process when expulsion from the United States is at stake.

At issue particularly is the constitutional import of *Gomez* v. *United States*, 490 U.S. 858 (1989). In concluding that *Gomez* had no import, and that a magistrate

may exercise far greater authority under 18 U.S.C. § 3184 than this Court in *Gomez* allowed under 28 U.S.C. § 636, the Second Circuit has rendered a decision that is irreconcilable with the text of the extradition statute, with *Gomez* itself, and with the contrary interpretation given *Gomez* by several other Circuits.

A. The Court of Appeals' Decision That Magistrates Possess an Independent Grant of Authority Conflicts With the Text of the Statute and *Grin* v. *Shine*.

The Second Circuit held that section 3184 provides an "independent grant of authority" to magistrates to conduct extradition proceedings. A. 18a. This holding cannot be squared with the text of the statute or this Court's decision in *Grin* v. *Shine*, 187 U.S. 181 (1902).

Under the extradition statute, magistrates are given merely a delegated power: they can preside over extradition proceedings only if "authorized so to do" by an Article III court. 9 Stat. 302, § 1; 18 U.S.C. § 3184. Indeed, the Second Circuit itself held previously that the extradition statute "authorizes a court to delegate responsibility." *Austin* v. *Healey*, 5 F.3d 598, 602 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1192 (1994). In the exercise of that delegated power, as this Court has said in an extradition case, a federal magistrate judge "is in fact an adjunct of the court," who exercises judicial power. *Grin*, 187 U.S. at 187.[9]

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[9] As adjuncts of the district courts by which they are appointed, magistrates conducting extradition proceedings are "judicial officers" resident in the Judicial Branch, just as they are when they act as adjuncts under the Magistrates Act. 28 U.S.C. § 632(a); see, *e.g.*, S. Rep. No. 74, 96th Cong., 1st Sess. (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1470-72; H.R. Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255. And, as adjunct judicial officers, magistrates in extradition can possess no more or different power than that delegated to them by Article III courts. *Grin*, 187 U.S. at 187.

B. The Court of Appeals' Decision Conflicts With *Gomez* v. *United States* and *United States* v. *Raddatz*.

Gomez v. *United States*, 490 U.S. 858 (1989), held that the proper function of magistrates is so circumscribed that a magistrate may not even preside at the preliminary phase of jury selection in a felony trial. *United States* v. *Raddatz*, 447 U.S. 667 (1980), allowed magistrates to participate in the criminal process by recommending findings on suppression motions only when "the entire process takes place under the district court's total control and jurisdiction," and the judge "exercises the ultimate authority to issue an appropriate order," *id.* at 681, 682. Without consent, magistrates may not even hear federal misdemeanor cases, see 18 U.S.C. § 3401(b), nor, without violating Article III, may they hear and decide civil cases without consent of the parties. *E.g.*, *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 542 (9th Cir.) (*en banc*) (*Kennedy, J.*), *cert. denied*, 469 U.S. 824 (1984); see 28 U.S.C. § 636(c).

Those decisions of this Court and the courts of appeals settled that magistrates may participate significantly in criminal or civil adjudication only when either (1) the parties consent; or (2) the magistrate assists in interstitial rulings while "constantly subject to the court's control" and "so long as the ultimate decision is made by the district court." *Raddatz*, 447 U.S. at 682-83. See also *Thomas* v. *Arn*, 474 U.S. 140, 154 (1985) ("The district judge has jurisdiction over the case at all times").

Neither of these conditions exists here. Yet the Second Circuit upheld the delegation to the magistrate because the interest at stake—extradition of a citizen to a foreign country—was simply too trivial to require an Article III court. The Second Circuit apparently believed that even though the magistrate's hearing is unsupervised and the decision not even reviewed by appeal, an extradition is of no more consequence than a preliminary examination un-

der Federal Rule of Criminal Procedure 5.1 (by which, if such an examination occurs at all, a magistrate determines whether a defendant shall be held to answer before a District Judge). A. 6a (quoting *Ward* v. *Rutherford*, 921 F.2d 286, 287-88 (D.C. Cir. 1990)).[10]

Yet much more is at stake in extradition than in an ordinary civil case, or even many criminal ones. Extradition proceedings adjudicate the core liberty interest of a citizen to remain in the United States and under the protection of its laws,[11] and have been described by this Court as "cases of a criminal nature." *Rice* v. *Ames*, 180 U.S. 371, 374 (1901). And unlike virtually everything else a magistrate does, the magistrate, if he or she sits in an extradition proceeding, occupies an extraordinarily independent and decisive role. The magistrate is not subject to any kind of supervision or *de novo* review by a judge at all. The magistrates' decision is not even appealable. See *United States* v. *Doherty*, 786 F.2d 491 (2d Cir. 1986). Judicial correction, if any, occurs only through the limited vehicle of habeas corpus.[12]

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[10] A preliminary examination, by contrast, is a temporary protection and not even an absolute right; it is easily extinguished if the prosecution chooses to proceed by indictment prior to the hearing. See Fed. R. Crim. P. 5(c); 18 U.S.C. § 3060(e).

[11] "Once his extradition was accomplished . . . he became subject to the judicial process of the receiving nation . . . ." *Berenger* v. *Vance*, 473 F. Supp. 1195, 1198 (D.D.C. 1979); see also, *e.g.*, *Shapiro* v. *Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *pet'n for cert. dismissed*, 414 U.S. 884 (1973); *Gallina* v. *Fraser*, 177 F. Supp. 856, 866 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

[12] "[T]he writ of *habeas corpus* . . . does not operate as a writ of error, and many of the orders and decisions made by the commissioner at the hearing . . . become unimportant in the examination. . . ." *Benson* v. *McMahon*, 127 U.S. 457, 461-62 (1888); see also *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979) (it is "long settled that an error that may justify reversal on direct appeal will not necessarily support a collateral attack"); *Hooker* v.

The Court of Appeals' assumption here—that international extradition is a relatively trivial activity most comparable to a preliminary examination, to be carried out independently by federal magistrates and not requiring a constitutional judge under Article III and due process—simply cannot be squared with the reality of extradition or this Court's decisions.

C. The Court of Appeals' Decision Conflicts With Recent Decisions In Other Circuits.

In matters of far less importance than extradition, magistrates have been denied even modest decision-making powers in federal proceedings. This Court has warned that to construe the role of magistrates broadly would pose "grave constitutional questions." *Gomez*, 490 U.S. at 862. In allowing magistrates total, unsupervised and "independent." A. 18a, control over extradition proceedings, the Second Circuit has improperly allowed magistrates to exercise the full powers of district courts, in conflict with the reasoning of recent holdings in at least four other Circuits.

1. Magistrates exercise the full powers of a district court when presiding over extradition proceedings; they thus act impermissibly as substitutes for the court, and not merely as adjuncts to one. Indeed, there is no difference in substance or procedure between the way a district court conducts an extradition proceeding and the way a magistrate does. Even in an ordinary extradition proceed-

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Klein, 573 F.2d 1360, 1364-65 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978) ("In pursuing habeas corpus relief a fugitive at law subject to an order of extradition necessarily foregoes the advantage of the broader scope of review that attends direct appeal. The area of inquiry into orders of extradition that a habeas corpus court permissibly may undertake is considerably restricted. . . . [A] writ of habeas corpus cannot take the place of a writ of error and 'is not a means for rehearing what the magistrate already has decided.' *Fernandez* v. *Phillips*, [268 U.S. 311, 312 (1925)].").

ing, the judge or magistrate must, for example, perform such basic judicial functions as:

> —ruling on disputed issues of law, often involving interrelations with state or foreign law, *e.g.*, *Shapiro* v. *Ferrandina*, 355 F. Supp. 563, 570-72 (S.D.N.Y.), *modified*, 478 F.2d 898 (2d Cir.), *pet'n for cert. dismissed*, 414 U.S. 884 (1973); *In re Lo Dolce*, 106 F. Supp. 455, 460 (W.D.N.Y. 1952);
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> —ruling on the admissibility of evidence, *e.g.*, *In re David*, 395 F. Supp. 803, 805-06 (E.D. Ill. 1975);
>
> —conducting evidentiary hearings, *McElvy* v. *Civiletti*, 523 F. Supp. 42, 46 (S.D. Fla. 1981), including hearing live witnesses, see *In re Atta*, 706 F. Supp. 1032, 1036 (E.D.N.Y. 1989);
>
> —analyzing all the evidence, *e.g.*, *In re Prushinowski*, 574 F. Supp. 1439, 1448-52 (E.D.N.C. 1983);
>
> —making determinations of foreign law, *Caplan* v. *Vokes*, 649 F.2d 1336, 1343-44 (9th Cir. 1981);
>
> —issuing subpoenas to third parties, see 18 U.S.C. § 3191, and ruling on protective orders, *e.g.*, *First National City Bank* v. *Aristequieta*, 287 F.2d 219, 226-28 (2d Cir. 1960), *vacated*, 375 U.S. 49 (1963).
>
> —determining "the credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate," as is also the delicate and often controversial judgment whether an offense is "political." *Quinn* v. *Robinson*, 783 F.2d 776, 815 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981).

Finally, and perhaps most importantly, magistrates conducting extradition proceedings—like the unconstitutional bankruptcy courts in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), but unlike the constitutional administrative board in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 850 (1986)

—are empowered to issue their judgments without the approval or even participation of the district court. Under section 3184, the magistrate's extradition certification is transmitted directly to the Secretary of State, who can then act as he chooses, without any further approval by a court.

2. In approving such broad, unsupervised, independent power to magistrates, the Second Circuit has put itself at odds with the reasoning of a least four other Circuits:

—In *United States* v. *Colacurcio*, 84 F.3d 326, 344 (9th Cir. 1996), the Ninth Circuit expressly held that a defendant had a "constitutional right to have an Article III judge preside over his probation revocation hearing"; see also *United States* v. *France*, 886 F.2d 223, 226 (9th Cir. 1989) (holding that *Gomez* was "compelled" by constitutional considerations), *aff'd*, 498 U.S. 335 (1991).

—In *Olympia Hotels Corp.* v. *Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1367 (7th Cir. 1990), the Seventh Circuit held that if the Magistrates Act, 28 U.S.C. § 636, were read to authorize magistrates to preside without consent at voir dire in civil cases, it might well violate Article III.

—In *Banks* v. *United States*, 614 F.2d 95, 98 n.8 (6th Cir. 1980), the Sixth Circuit held that probation revocation hearings allowing a magistrate to engage in "fact-finding and credibility assessment" were not authorized by the Magistrates Act and posed constitutional problems as well.

—In *United States* v. *Curry*, 767 F.2d 328, 331 (7th Cir. 1985), relying on the reasoning employed by *Banks, supra*, the Seventh Circuit also held that a magistrate may not conduct or decide a probation revocation hearing.

—In *United States* v. *Bryson*, 981 F.2d 720, 724 n.4 (4th Cir. 1992), the Fourth Circuit held that the Magistrates Act did not authorize a magistrate to entertain a defendant's motion to revise his sentence

> and noted that Congress' purpose in so limiting magistrates' authority was "quite obviously, to avoid potential Article III infirmities."

In brushing aside *Gomez* and the recent cases in other Circuits holding, with the Constitution in mind, that magistrates may not be delegated significant decision-making power in federal cases, and certainly may not be delegated power to make unappealable findings and final adjudications of liberty, the Second Circuit here took a turn that is simply irreconcilable with a flood of contemporaneous decisions in other Circuits.

D. The Court of Appeals' Decision Conflicts With *Ng Fung Ho* v. *White*.

The Second Circuit's decision is also irreconcilable with the law of Fifth Amendment due process declared by this Court through Justice Brandeis in *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). The issue there was what sort of hearing an alien was entitled to prior to deportation if he claimed to be a United States citizen. A citizen, of course, cannot be deported,[13] and the right of a citizen to remain in this country, the Supreme Court has held, was so important that only an Article III court could hear and decide such a case:

> To deport one who so claims to be a citizen, obviously deprives him of liberty. . . . It may result also in loss of both property and life; or of all that makes life worth living.

259 U.S. at 284-85; *see also Landon* v. *Plasencia*, 459 U.S. 21, 32-33 (1982) (liberty interest in remaining in the United States increases with one's ties here); *Agosto* v. *INS*, 436 U.S. 748, 753 (1978) ("the Constitution requires that there be some provision for de novo judicial determination of claims to American citizenship in deportation proceedings").

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[13] *See Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976).

Mr. LoDuca is a citizen of the United States, not some foreign fugitive passing through. His fundamental liberty interest in staying in his country cannot be dismissed as insignificant. *Ng Fung Ho* requires that an Article III court determine Mr. LoDuca's citizenship. An Article III court should be required to determine whether he can be deprived of all the rights that citizenship guarantees.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY
MATTHEW J. HERRINGTON
WILLIAMS & CONNOLLY
725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

JAMES W. SHANNON, JR.
Crown Quadrangle, Rm. 132
Stanford, California 94305
(415) 723-2511

Attorneys for Petitioner
Paolo LoDuca

September 17, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 734—August Term 1995

Argued: February 21, 1996 Decided: August 29, 1996

Docket No. 95-2462

PAOLO LO DUCA,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before: NEWMAN, *Chief Judge*, KEARSE, *Circuit Judge*, and WEXLER, *District Judge.**

JON O. NEWMAN, *Chief Judge*:

This appeal presents a novel challenge to the constitutionality of the United States extradition statute, 18 U.S.C. § 3184 (1994), which has governed the extradition of fugitives found in this country for nearly 150 years. Petitioner-appellant Paolo Lo Duca appeals from the July 24, 1995, judgment of the United States District Court for the Eastern District of New York (David G. Trager,

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* Honorable Leonard D. Wexler, of the United States District Court for the Eastern District of New York, sitting by designation.

Judge), dismissing his petition for a writ of habeas corpus. Lo Duca contends primarily that his extradition is unconstitutional because section 3184 violates the doctrine of separation of powers. Because we see no constitutional infirmity in the statute, we affirm the judgment of the District Court.

Background

In March 1993, Paolo Lo Duca was convicted by the Court of Palermo in Italy for various narcotics-related offenses after being tried *in absentia.* Although Lo Duca, an Italian citizen residing in Sands Point, New York, refused to appear for trial, he was represented by his attorney in all proceedings. The evidence showed that Lo Duca, as a member of the Sicilian Mafia, had conspired to import cocaine from Colombia through the United States to Italy. Lo Duca was sentenced by the Court of Palermo to nineteen years in prison.

The Republic of Italy subsequently submitted an application, in accordance with Article XII of the Italian-American extradition treaty, requesting that the United States provisionally arrest Lo Duca. *See* Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, October 13, 1983, U.S.-Italy, art. XII, T.I.A.S. No. 10837 ("Extradition Treaty"). In May 1994, the Government, acting on behalf of the Republic of Italy, filed a complaint in the Eastern District of New York seeking an arrest warrant for Lo Duca. Then-Magistrate Judge Allyne R. Ross granted the request, and Lo Duca was taken into custody.

The Republic of Italy then made a formal request to extradite Lo Duca pursuant to Article X of the Extradition Treaty. In November 1994, Magistrate Judge Steven M. Gold held a hearing in accordance with 18 U.S.C. § 3184 to review the evidence of criminality and deter-

mine whether Lo Duca could be extradited by the Secretary of State. Magistrate Judge Gold examined the appropriate documents required under Article X of the Extradition Treaty, including a text of the relevant Italian laws and a summary of the evidence against Lo Duca. He found probable cause to extradite.

Magistrate Judge Gold also considered a legal challenge to the extradition of Lo Duca for the Italian offense of "association of mafia type." Lo Duca contended that the Italian statute criminalized conduct that was not punishable under the laws of the United States, and therefore failed to meet the dual-criminality requirement of the Extradition Treaty. *See* Extradition Treaty, art. II, T.I.A.S. No. 10837. Magistrate Judge Gold rejected this argument, finding that the offense of "association of mafia type" applied to conspirators who "avail themselves of the power of intimidation and of the condition of subjection and conspiracy of silence deriving therefrom for the purpose of committing crimes." He concluded that the Italian offense was similar to RICO and other conspiracy offenses that are well-recognized in the United States. Magistrate Judge Gold then certified Lo Duca to the Secretary of State for extradition.

Lo Duca subsequently sought a writ of habeas corpus from the District Court arguing (1) that the documents submitted to the extradition officer were insufficient to comply with Article X of the Extradition Treaty, and (2) that the Italian offense of "association of mafia type" failed to meet the dual-criminality requirement. Judge Trager denied his petition for a writ of habeas corpus. Lo Duca now appeals.

Discussion

I. The Constitutionality of 18 U.S.C. § 3184.[1]

The federal extradition statute, 18 U.S.C. § 3184, was first enacted nearly 150 years ago to provide a legal framework for extradition proceedings involving fugitives found in the United States. Prior to 1848, extradition was largely a matter committed to the discretion of the

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[1] At the outset, Lo Duca argues that this Court is bound by Judge Lamberth's decision in *Lobue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995), *vacated*, 82 F.3d 1081 (D.C. Cir. 1996), striking down section 3184 as unconstitutional. In a subsequent unpublished order, Judge Lamberth granted class certification and extended his declaratory judgment to all potential extraditees. Judge Lamberth also enjoined the Secretary of State from extraditing any fugitives from the United States to foreign countries. *See Lobue v. Christopher*, No. CA 95-1097 (D.D.C. Sept. 15, 1995) (order granting certification and class-wide injunction).

Thereafter, the D.C. Circuit issued an order preliminarily staying Judge Lamberth's class-wide injunction pending appeal. The Government, however, did not request a stay of the declaratory judgment or class certification. After oral argument, the D.C. Circuit issued an opinion vacating the judgment of the district court for lack of jurisdiction; however, it stayed its mandate pending a petition for rehearing and suggestion for rehearing in banc. *See Lobue v. Christopher*, No. 95-5293 (D.C. Cir. Apr. 30, 1996) (order withholding issuance of mandate). The petition for rehearing and the suggestion for rehearing in banc were denied on July 1, 1996.

Lo Duca now argues that Judge Lamberth's declaratory judgment and class certification, which still remain operative, are binding on this Court. However, the judgment in this case issued by Judge Trager in the Eastern District was entered before Judge Lamberth granted his declaratory judgment and class certification. Though Lo Duca might have been able to bring a successive habeas corpus petition after losing in the Eastern District, he elected to appeal from that judgment. Having done so, he was not free to participate in simultaneous litigation in the District of Columbia. *Cf. Sanders v. United States*, 373 U.S. 1, 18 (1963) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation . . . ."). We believe that this Court may decide all issues raised on this appeal, regardless of the disposition of *Lobue*.

Executive Branch. *See Austin v. Healey*, 5 F.3d 598, 604 (2d Cir. 1993) ("Congress reacted, in part, to 'the public clamor for judicial involvement in the extradition process.'") (quoting Jacques Semmelman, *Federal Courts, The Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198, 1208 (1991)), *cert. denied*, 114 S. Ct. 1192 (1994). The primary function of section 3184 is to "interpos[e] the judiciary between the executive and the individual." *Id.*[2] To that end, the extradition statute requires the Government to submit a formal complaint setting forth the legal and factual bases for extradition. The complaint must be brought before an extradition officer—"any justice or judge of the United States, or any magistrate authorized . . . by a court of the United States, or any judge of a court of record of general jurisdiction of any State . . . ." 18 U.S.C. § 3184. The extradition officer is then directed to hear and consider the "evidence of criminality." *Id.* If the evidence is sufficient "to sustain the charge under the provisions of the proper treaty or convention," the extradition officer is instructed to issue a certificate of extraditability to the Secretary of State. *Id.* At that point, the Secretary of State has final authority to extradite the fugitive, but is not required to do so. Pursuant to its authority to conduct foreign affairs, the Executive Branch retains plenary discretion to refuse extradition.

The extradition hearing conducted pursuant to section 3184 "is not . . . in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him . . . ." *Benson v. McMahon*, 127

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[2] In the absence of section 3184, the Executive Branch would retain plenary authority to extradite. *See Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893) ("[T]he surrender, pursuant to treaty stipulations, of persons residing or found in this country and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate.").

U.S. 457, 463 (1888). Instead, it is "essentially a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation." *Ward v. Rutherford*, 921 F.2d 286, 287-88 (D.C. Cir. 1990) (citation omitted), *cert. dismissed*, 501 U.S. 1225 (1991). As the Supreme Court has stated, "The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction." *Collins v. Loisel*, 259 U.S. 309, 316 (1922). The judicial officer who conducts an extradition hearing "thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense." *Ward*, 921 F.2d at 287-88; *see also In re McMullen*, 989 F.2d 603, 611 (2d Cir.) (in banc) ("What is at issue in the proceeding, therefore, 'is not punishability but prosecutability.'") (quoting M. Cherif Bassiouni, *International Extradition and World Public Order* 524 (1974)), *cert. denied*, 114 S. Ct. 301 (1993).

If the extradition officer issues a certificate of extraditability, the Secretary of State "may" order the fugitive to be delivered to the extraditing nation. 18 U.S.C. § 3184. The Secretary of State, however, is under no legal duty to do so. *See* 6 M. Whiteman, *Digest of International Law* 1046 (1968) ("[T]he judicial branch cannot, as a matter of domestic law, bind the executive to grant extradition."). On the other hand, if the extradition officer declines to issue a certificate of extraditability, the complaint is dismissed and the Secretary of State has no authority to order the surrender of the fugitive. *See In re Mackin*, 668 F.2d 122, 125-28 (2d Cir. 1981). While a new extradition complaint may be submitted, unless it leads to a certificate of extraditability, no extradition is allowed. *See United States v. Doherty*, 786 F.2d 491, 495 (2d Cir. 1986); *cf. Collins v. Loisel*, 262 U.S. 426,

429-30 (1923) (successive complaints seeking extradition do not violate Double Jeopardy Clause).

In this case, Lo Duca's primary contention is that the legal framework established by the extradition statute is unconstitutional. We note at the outset that Lo Duca raises this argument for the first time on appeal. The general rule is that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). That rule, however, is one of prudence and not appellate jurisdiction. We retain broad discretion to consider issues not raised initially in the District Court. *See Austin*, 5 F.3d at 601. Since the argument proffered by Lo Duca involves constitutional notions of separation of powers, the Government's response that Lo Duca has waived his claims "cannot be dispositive." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986). In this case, we think that the constitutional issues advanced by Lo Duca are sufficiently important that they should be assessed on their merits.[3]

Lo Duca presents two alternative contentions, consideration of which depends upon our resolution of an initial question: do judicial officers acting pursuant to section 3184 exercise the "judicial power" of the United States under Article III of the Constitution? If an extradition officer does exercise Article III power, then Lo Duca contends that the statutory scheme is unconstitutional since it subjects Article III judgments to revision by the Executive Branch. On the other hand, if an extradition officer does not exercise Article III power, then Lo Duca contends that Congress has unconstitutionally authorized federal judges and magistrate judges to engage in extrajudicial activities.

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[3] We need not consider Lo Duca's contention that, insofar as his claim involves a "structural" challenge to section 3184 rather than a challenge asserting "personal" rights, *Schor* divests us of our discretion and requires us to consider his constitutional claims.

This is not the first time that our Circuit has considered the question of whether extradition officers exercise Article III power. In *Austin*, we recently held that the function performed by an extradition officer is not an exercise of the judicial power of the United States. *Austin*, 5 F.3d at 603. This holding accords with the decisions of the First, Eleventh, and District of Columbia Circuits. *See In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993); *Martin v. Warden*, 993 F.2d 824, 828 (11th Cir. 1993); *Ward*, 921 F.2d at 288 n.2; *see also In re Kaine*, 55 U.S. (14 How.) 103, 119 (1852) (Curtis, J., concurring). *But see United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 53-54 (1795).

Lo Duca contends that our holding in *Austin* should be reconsidered, even though in this Circuit a subsequent panel may not overrule the decision of a prior panel. *See Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995) ("A decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court."). Though *Austin* did not consider the same constitutional claims raised by Lo Duca, we see no reason to depart from our precise holding that extradition officers do not exercise Article III power. We believe nonetheless that some amplification of that holding may assist in assessing Lo Duca's subsequent contentions.

Our holding in *Austin* derives primarily from the Supreme Court's decision in *In re Metzger*, 46 U.S. (5 How.) 176 (1847), which held that the Court lacked jurisdiction to review the judgment of an extradition officer.[4] The Court based its decision on the fact that "the case . . . was heard and decided by the district judge at his chambers, and not in court . . . ." *Id.* at 191. Pre-

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[4] *Metzger* was decided prior to the enactment of section 3184. In that case, the Government was not required to seek approval from an extradition officer; however, it did so nonetheless, and the Supreme Court found that the Executive had acted "very properly" in that regard. *Metzger*, 46 U.S. (5 How.) at 188-89.

sumably, the Court was describing the role of the district judge rather than the place of his decision-making, since the Court later noted that the judge was exercising "a special authority" for which no provision existed regarding the appealability of his decision. *Id.* Thus, the Supreme Court held that it could not maintain appellate jurisdiction; moreover, since original jurisdiction was also lacking, it could not issue a writ of *habeas corpus* on Metzger's behalf. *Id.* at 192; *see Mackin,* 668 F.2d at 125.

The statement in *Metzger* that extradition officers exercise "a special authority" implies that their adjudicatory powers do not derive from Article III. Rather, extradition officers have been said to act in a "non-institutional capacity." *See Austin,* 5 F.3d at 603 (quoting *Howard,* 996 F.2d at 1325). Although Lo Duca asserts that *Metzger* was overruled when Congress enacted section 3184, this Court in *Mackin* reached a different conclusion. Judge Friendly wrote that "[n]othing on the face of the statute or in its legislative history shows an intention to alter the Supreme Court's ruling [in *Metzger*] with respect to appealability." *Mackin,* 668 F.2d at 126. "During floor debates of the proposed extradition act Senator Dayton referred to the Supreme Court's decision in the *Metzger* case, but did not intimate that the bill would alter the result of that case." *Id.* at 126 n.7 (citing Cong. Globe, 30th Cong., 1st Sess. 868 (1848)). Thus, the rule in *Metzger* remains viable, and the fact that decisions of extradition officers are non-appealable strongly indicates that such officers do not exercise Article III power.

This conclusion is bolstered by the fact that, although direct judicial review of an extradition proceeding is not available, there is the possibility for what has been called "executive revision," pursuant to the discretionary authority of the Executive Branch to refuse extradition. *See generally* Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 95-97 (3d ed. 1988). The first case involving executive revision arose

in a different context in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (Little, Brown & Co. 1855). Congress had provided that the circuit courts should decide in the first instance whether individual veterans were eligible for disability pensions. These determinations, however, were subject to revision by the Secretary of War. Chief Justice Jay and Justice Cushing, sitting as members of the Circuit Court of the District of New York, held that "the [pension adjusting] duties assigned to the Circuit Courts . . . are not of [judicial] description . . .; inasmuch as [the statute] subjects the decisions of these courts . . . to the consideration and suspension of the Secretary at War . . . ." *Id.* at 410 n.1. Similar statements regarding the non-judicial nature of the power granted by Congress were made by Justices Wilson, Blair, and Iredell in their capacities as circuit judges. *Id.* Thus, the various Justices held that the statute failed to accomplish a grant of judicial power under Article III, and in that regard, the fact that the statute contemplated executive revision was dispositive.

Chief Justice Jay and Justice Cushing additionally explained that the statute could be considered, not as a grant of Article III power, but "as appointing commissioners for the purposes mentioned in it . . . ." *Id.* (emphasis added). "[T]he Judges of this Court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office." *Id.* The Justices concluded that "the Judges of this Court will . . . adjourn the court from day to day . . . and . . . proceed as commissioners to execute the business of this act in the same court room, or chamber." *Id.* Notably, the Justices found no constitutional impediment to their rendering adjudicatory decisions under the statute, as long as those decisions were distinct from their judicial functions regarding cases and controversies under Article III.

In *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852) (Little Brown & Co. 1870), the Supreme Court

considered a similar statute authorizing federal district judges in Florida to adjust certain claims made by the Spanish inhabitants of that state against the United States. *Id.* at 45. Those determinations were subject to approval by the Secretary of the Treasury. *Id.* The Supreme Court held that "such a tribunal is not a judicial one . . . . The authority conferred on the respective judges was nothing more than that of a commissioner . . . ." *Id.* at 47. As the Supreme Court elaborated:

> The powers conferred by these acts of congress upon the judge . . . are, it is true, judicial in nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty . . . . [It] is not judicial . . . , in the sense in which judicial power is granted by the constitution to the courts of the United States.

Id. at 48. Thus, the Supreme Court found it unexceptional that the judges, as commissioners, acted in an "adjudicatory" capacity.[5]

Instead of focusing on the misleading distinction between adjudicatory and non-adjudicatory functions, *Ferreira* relied on the fact that the decisions of the district judges were subject to executive revision. The Supreme

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[5] The Constitution itself provides numerous situations where some form of adjudication is required outside the context of Article III. For example, the executive decision to grant a Presidential pardon may be based on a review of the law and facts that would normally be reserved to the province of courts. Similarly, the executive decision to veto legislation may be based on an opinion that such legislation is unconstitutional. *See* Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System, supra,* at 471 ("[T]he concept of 'the judicial power' *cannot* be defined so as . . . to create a monopoly for the judges in the adjudicatory task of finding facts and determining the meaning and applicability of provisions of law.") (emphasis in original).

Court found it "too evident for argument" that the statute did not confer Article III power since

> neither the evidence, nor the [judge's] award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided to the secretary of the treasury; and the claim is to be paid, if the secretary thinks it just and equitable, but not otherwise.

Id. at 46-47. Thus, the fact of executive revision led the Supreme Court in *Ferreira* to hold that those judges, acting as commissioners, did not exercise Article III power. Similarly, in this case, it is dispositive that, since the decisions of extradition officers are subject to revision by the Secretary of State, those officers do not exercise judicial power within the meaning of Article III. *See Doherty*, 786 F.2d at 499 n.10 ("The . . . function of issuing the certificate [of extraditability is] nonjudicial because . . . the Secretary of State is not bound to extradite even if the certificate is granted.").[6]

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[6] Lo Duca notes that, as a practical matter, extradition officers certainly appear to exercise judicial power—they issue arrest warrants, preside in courtrooms, and use other judicial resources. These actions, however, are not incompatible with their designation as commissioners acting in a non-Article III capacity. Their authority to issue arrest warrants derives not from any inherent judicial power, but rather from the text of section 3184 itself. *See* 18 U.S.C. § 3184. Lo Duca does not contend that this task is such an "essential attribute of judicial power" that it can be exercised only within the confines of Article III. *See Schor*, 478 U.S. at 851; *cf. Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (administrative clerk of municipal court may issue arrest warrants).

As for the fact that extradition officers routinely preside in courtrooms and use other judicial resources in carrying out their duties, we see nothing exceptional in the use of such resources for extrajudicial functions. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.1 ("[T]he Judges of this Court will . . . proceed as commissioners to execute the business of this act in the same court room, or chamber."); *see also* 28 U.S.C. § 331 (1994) (contem-

Lastly, we point out that, as a matter of statutory language, section 3184 closely tracks the holdings of *Metzger, Hayburn's Case,* and *Ferreira* by granting jurisdiction over extradition complaints not to "courts" but to individual enumerated "justices," "judges," and "magistrates," including judges of state courts of general jurisdiction. *See* 18 U.S.C. § 3184. Thus, by its terms, "§ 3184 vests individual *judges* with jurisdiction over extradition requests." *Mackin,* 668 F.2d at 130 n.11 (emphasis in original). This distinction between "courts" and "judges" in the context of extradition proceedings has been long recognized. *See Shapiro v. Ferrandina,* 478 F.2d 894, 901 n.3 (2d Cir.), *cert. dismissed,* 414 U.S. 884 (1973); *Jimenez v. Aristeguieta,* 290 F.2d 106, 107 (5th Cir. 1961).[7] We note that, traditionally, it is "courts" and not "judges" that exercise Article III power. *See* U.S. Const. art. III, § 1 ("The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The use of the word "judges" in section 3184 is more consistent with a statute appointing commissioners "by official, instead of personal descriptions." *Hayburn's Case,* 2 U.S. (2 Dall.) at 410 n.1.[8]

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plating that Chief Judges of Courts of Appeals may use judicial resources to participate in Judicial Conference of United States); 28 U.S.C. § 332 (1994) (contemplating that judges may use judicial resources to participate in circuit judicial councils); *Chandler v. Judicial Council,* 398 U.S. 74, 86 n.7 (1970) (upholding constitutionality of 28 U.S.C. § 332).

[7] In contexts other than extradition, the textual difference between "courts" and "judges" may not necessarily be significant. *See In re United States,* 194 U.S. 196 (1904).

[8] Lo Duca calls our attention to an interesting peculiarity in the history of section 3184. He notes that the extradition statute, as originally drafted, included a phrase stating that state judges and commissioners are "hereby severally vested with power, jurisdiction, and authority" over extradition proceedings. Act of Aug. 12,

Having examined the text of the statute, its structural correlation with Article III, and the relevant historical

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1848, ch. 167, 9 Stat. 302, 302. That phrase was subsequently omitted when the statute was reworded during the first codification of the Statutes at Large. *Compare id. with* Revised Statutes of the United States, tit. 66, § 5270 (1st ed. 1875). Later codifications did not mention the revision, and its rationale remains a mystery. *See* Revised Statutes of the United States, tit. 66, § 5270 (2d ed. 1878); 18 U.S.C. § 3184 (1994); *see also* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1014-15 (1938) (noting that initial draft of Revised Statutes was notorious for unauthorized changes in statutory language).

Lo Duca argues that the use of the words "vest" and "jurisdiction" in the original statute implies a Congressional grant of Article III power. We note as an initial matter, however, that after 120 years of settled judicial understanding, it is not so clear that the original language of the statute should control. *See United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 449 & n.4 (1993) (adoption of Revised Statutes in 1874 involved Congressional re-enactment of all statutes in effect at that time and simultaneous repeal of all prior ones); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 408 (1982) (arguing that revision of 1874 was intended to clarify numerous conflicting and ambiguous provisions, and therefore Revised Statutes should be considered authoritative and not be parsed by reference to pre-codification law). *But see Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 624-27 (1979) (Powell, J., concurring); *United States v. Ryder*, 110 U.S. 729, 740 (1884) ("It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed.").

In any event, we do not consider the words "vest" and "jurisdiction" to be dispositive. First, those words apply only to state judges and commissioners, not to federal justices or judges. This fact strongly undercuts the interpretation proffered by Lo Duca since it would be odd, to say the least, for Congress, in assigning a single task, to vest unappealable Article III power in state judges and commissioners, who lack lifetime tenure and undiminishable salary, but not in federal justices or judges. Second, we note that similar "jurisdictional" language has been used by Congress in other non-Article III contexts. *See* 26 U.S.C. § 7442 (1994) ("juris-

precedents, we conclude that our holding in *Austin* was correct—extradition officers do not exercise judicial power under Article III of the Constitution. *Austin*, 5 F.3d at 603. We therefore turn to Lo Duca's following arguments, which contend that section 3184 is unconstitutional precisely because it does *not* confer Article III power.

A. *Tidewater* Claim

Lo Duca first argues that section 3184 violates the doctrine of separation of powers insofar as it seeks to require Article III courts to conduct non-Article III extradition proceedings. *See National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). In *Tidewater*, the Supreme Court confronted the question whether Congress could expand the jurisdiction of federal courts beyond the class of cases and controversies enumerated in Article III. In three separate opinions, six Justices reaffirmed the traditional view that federal courts are courts of limited jurisdiction whose judicial powers are bounded by Article III. *See id.* at 607 (Rutledge, J., joined by Murphy, J., concurring in the judgment); *id.* at 635 (Vinson, C.J., joined by Douglas, J., dissenting); *id.* at 647 (Frankfurter, J., joined by Reed, J., dissenting). Justice Jackson expressed a contrary view in his plurality opinion announcing the judgment of the Court. *Id.* at 583 (Jackson, J., joined by Black and Burton, JJ.). He wrote that, under Article I, Congress could grant jurisdiction for federal courts to hear non-Article III cases. *See Tidewater*, 337 U.S. at 592-93. Justices Rutledge and Murphy, who "strongly dissent[ed]" from that reasoning, nonetheless concurred in the result on

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diction" of United States Tax Court); 28 U.S.C. § 1491(a)(1) (1994) ("jurisdiction" of Court of Federal Claims); 38 U.S.C. § 7252 (1994) ("jurisdiction" of United States Court of Veteran Appeals). The mere use of the word "jurisdiction" in those statutes does not transform expressly designated Article I courts into Article III courts. *See* 26 U.S.C. § 7441 (1994); 28 U.S.C. § 171 (1994); 38 U.S.C. § 7251 (1994).

other grounds. *See id.* at 604, 626 (Rutledge, J., concurring in the judgment) (calling the opinion of Justice Jackson a "dangerous doctrine"). *See generally* Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System*, *supra*, at 474-75.

In cases reaching as far back as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court has held that Congress may not expand the jurisdiction of federal courts beyond the limits established by Article III. *Id.* at 174; *see Kline v. Burke Construction Co.*, 260 U.S. 226, 234-35 (1922) ("[Congress] may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("The Constitution has defined the limits of the judicial power of the United States . . . ."); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (Marshall, C.J.) ("Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution."). Most recently, in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Supreme Court stated that "Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III." *Id.* at 1128 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137). Lo Duca relies on these cases to contend that the Constitution prevents Congress from vesting federal courts with jurisdiction over non-Article III extradition complaints.

Without questioning these cases, the Government responds that federal *courts* are not the subject of section 3184. Rather, "§ 3184 vests individual *judges* with jurisdiction over extradition requests." *Mackin*, 668 F.2d at 130 n.11. This distinction between "courts" and "judges" is dispositive. As Judge Friendly noted, section 3184 forbids "courts" to issue certificates of extraditability. *Doherty*, 786 F.2d at 499. "We thus need not consider

whether . . . Congress could constitutionally vest an Article III *court* with the nonjudicial function of issuing the certificate . . . ." *Id.* at 499 n.10 (emphasis in original). Only individual justices, judges, and magistrate judges are authorized to act under the statute. Since they function, as in *Hayburn's Case* and in *Ferreira*, as commissioners, they are not bound by the limits of Article III.

B. *Mistretta* Claim

Lo Duca next argues that, insofar as section 3184 requires judges to act in an extrajudicial capacity, the statute runs afoul of *Mistretta v. United States*, 488 U.S. 361 (1989). In *Mistretta*, the Supreme Court was concerned with the possibility that Congress might compromise the independence of Article III judges by requiring them to participate in extrajudicial activities. This concern, however, does not apply with equal force to those who are not Article III judges. Thus, Lo Duca's claim founders at the outset since his extradition proceedings were conducted solely by federal magistrate judges. Then-Magistrate Judge Ross issued the warrant under which Lo Duca was arrested. Magistrate Judge Gold conducted the subsequent extradition hearing and granted the certificate of extraditability. Since federal magistrate judges are not Article III judges, the Constitution does not accord them the same protections against Congressional expansion of their duties. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79-80 (1982) (plurality opinion) (magistrate judges are "non-Art[icle] III officers"); *Wingo v. Wedding*, 418 U.S. 461, 467 n.4 (1974) (magistrate judges are " 'outside the pale of Article III' ") (quoting *Wedding v. Wingo*, 483 F.2d 1131, 1133 n.1 (6th Cir. 1973)). Nothing in *Mistretta* suggests that federal magistrate judges would be precluded from conducting extradition proceedings.

Lo Duca argues nonetheless that, if Article III judges cannot act as extradition officers, then they lack the power to delegate those duties to a magistrate judge under the Federal Magistrates Act, 28 U.S.C. § 636(b) (1994). This argument presupposes that magistrate judges serve as extradition officers in their capacity as "adjuncts" to Article III courts under section 636(b). Yet, as this Court has pointed out, magistrate judges acting under section 3184 do not rely on the Federal Magistrates Act for their authority. *Jhirad v. Ferrandina*, 536 F.2d 478, 486 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976). Rather, section 3184 contains its own independent grant of authority to allow magistrate judges to hear extradition complaints. 18 U.S.C. § 3184. Once a magistrate judge is authorized to act under section 3184, that officer does not need subsequent permission from a supervising court on a case-by-case basis. *See In re Farez*, 8 F. Cas. 1007, 1008 (C.C.S.D.N.Y. 1870) (No. 4,645). A magistrate judge serving as an extradition officer pursuant to section 3184 acts as a commissioner, in the same capacity as any other enumerated justice or judge under section 3184.

In any event, even if Lo Duca's extradition proceedings had been conducted by a federal judge, there would be no violation of *Mistretta*. On the contrary, *Mistretta* expressly states that federal judges may participate in extrajudicial activities as long as two requirements are met. First, the judge must be acting "in an individual, not judicial, capacity." *Mistretta*, 488 U.S. at 404. Second, "a particular extrajudicial assignment [must not] undermine[] the integrity of the Judicial Branch." *Id.*[9] We have already held that judges acting pursuant to section 3184 do so as commissioners in an individual capacity. We now consider whether the particular task of adjudicat-

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[9] *Mistretta* pointed to *Hayburn's Case* and *Ferreira* as two examples where judges acted permissibly as commissioners in performing adjudicatory functions outside of Article III. *Mistretta*, 488 U.S. at 403.

ing extradition complaints might undermine the integrity of the Judicial Branch.

Mistretta was concerned with two possible subversions of judicial integrity. The first was the possibility that Congress might force federal judges to perform extrajudicial tasks. *See id.* at 405-06; *but see id.* at 406 n.29 (Congress may require Chief Judges of Courts of Appeals to participate in Judicial Conference of United States). In this case, however, we have no reason to believe that any federal judge has been forced to conduct an extradition proceeding. Moreover, since we are instructed to construe federal statutes to avoid constitutional infirmity, we read section 3184 as merely *authorizing* federal judges to act as extradition officers. *See Jimenez v. Aristeguieta*, 311 F.2d 547, 554 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.1 ("[T]he Judges of this Court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office."). Section 3184 states that an extradition officer "*may* . . . issue his warrant for the apprehension of the person so charged, that he *may* be brought before such justice, judge, or magistrate, to the end that the evidence of criminality *may* be heard and considered." 18 U.S.C. § 3184 (emphasis added).[10]

Mistretta was also concerned with the possibility that certain extrajudicial activities might undermine the integrity of the Judicial Branch by weakening public confidence. *See Mistretta*, 488 U.S. at 407-08. We believe that, in this particular context, history sufficiently allays this concern. For nearly 150 years, federal judges have

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[10] It is worth bearing in mind that "justices" as well as "judges" are included in the description of extradition officers. It is highly unlikely that Congress intended to require Justices of the Supreme Court to perform the relatively ministerial task of determining whether a particular fugitive is extraditable.

adjudicated extradition complaints under section 3184 with no indication of any adverse consequences. Of course, this is hardly surprising since an extradition proceeding is "an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate." *Id.* at 407. We conclude that the extrajudicial duties authorized by section 3184 do not undermine the integrity of the Judicial Branch, and *Mistretta* does not prohibit federal judges from hearing extradition complaints.

C. Appointments Clause Claim

Lo Duca's final argument invokes the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. He contends that, insofar as judicial officers acting under section 3184 do not serve in their traditional capacity as "justice," "judge," or "magistrate," they must receive a second appointment to carry out their duties as "extradition officer." This argument might carry some weight if the description of extradition officers in section 3184 included persons who held no prior office, but extradition officers have already been appointed to one position—either justice, judge, or magistrate judge. Where Congress provides additional duties that are "germane" to an already existing position, the Appointments Clause does not require a second appointment. *Weiss v. United States*, 114 S. Ct. 752, 758-79 (1994); *Shoemaker v. United States*, 147 U.S. 282, 300-301 (1893). The "germaneness" standard set forth in *Shoemaker* is fully met in this case. The duties performed by an extradition officer are virtually identical to those performed every day by judges and magistrate judges in the course of preliminary criminal proceedings. This case is a far cry from *Mistretta*, where participation on the Sentencing Commission entailed duties that were substantially different from a judge's normal tasks. Since extradition proceedings are sufficiently germane to the traditional duties of judges and magistrate judges, under the Appointments Clause,

these judicial officers do not require a second appointment to hear extradition complaints.[11]

II. Remaining Issues

Lo Duca also presents two non-constitutional claims: (1) the Magistrate Judge failed to issue a proper extradition order in accordance with the Italian-American extradition treaty, and (2) the Italian crime of "association of mafia type" is not an extraditable offense. Both claims are unavailing.

A. Compliance with the Extradition Treaty

Article X of the Extradition Treaty sets forth the various requirements that must be met in order to support a formal request for extradition. *See* Extradition Treaty, art. X, T.I.A.S. No. 10837. Lo Duca argues that in this case the requirements of Article X were not met because Magistrate Judge Gold failed to enter the supporting documents into evidence, and certain necessary documents were not presented in their proper format.

Though this claim is of arguable merit, Lo Duca has waived it by failing to object at his extradition hearing. "Non-jurisdictional objections must . . . be timely raised or they are waived." *Jhirad*, 536 F.2d at 486; *see also Austin*, 5 F.3d at 601 (non-jurisdictional and non-constitutional arguments deemed to have been forfeited). The Magistrate Judge, while reviewing the supporting documents and marking them for identification, asked counsel for Lo Duca whether he had any objections:

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[11] Some might question whether the task of hearing extradition complaints, which is a *non-judicial* task for purposes of Article III, is nevertheless "germane" to the traditionally *judicial* task of determining probable cause. We think that this situation falls within a narrow (perhaps unique) set of circumstances where the function is technically non-judicial in nature, but sufficiently similar to judicial functions so as to satisfy the "germaneness" requirement.

> *The Court*: "I take it Mr. Abell, that I'm right in saying you haven't raised a challenge to the completeness under Article 10."
>
> *Mr. Abell*: "No."
>
> *The Court*: "But since I do need to make this independent of you, I want to do that. Okay."

In light of Lo Duca's express waiver, his arguments concerning procedural non-compliance with Article X have been forfeited.

B. Dual Criminality

Lo Duca contends that the District Court erred in finding that the Italian crime of "association of mafia type" is an extraditable offense. The Extradition Treaty contains a typical "dual criminality" requirement—the offense for which the fugitive is being extradited must be punishable under both Italian and United States criminal law. *See* Extradition Treaty, art. II(1), T.I.A.S. No. 10837. Lo Duca argues that the Italian anti-mafia law, as applied in the United States, would be unconstitutional because it punishes mere membership in an association.

The Italian anti-mafia law, however, is not so broadly written. The statute clearly defines an "association of mafia type" as follows:

> An association shall be of mafia type when its members avail themselves of the power of intimidation and of the condition of subjection and conspiracy of silence deriving therefrom for the purpose of committing crimes, of acquiring directly or indirectly the management or control of economic activities, concessions, authorizations, contract works or public services or of obtaining unlawful profits or advantages for themselves or others.

Codice penale art. 416 bis. (Italy). Thus, the Italian anti-mafia law appears to be quite analogous to the

United States conspiracy law, 18 U.S.C. § 371 (1994), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-63 (1994).

Moreover, in applying the dual criminality requirement against a foreign statute, we have never considered only the statutory text. Rather, we have looked towards the conduct of the accused to see if it falls within the proscription of American criminal law. *See Spatola v. United States*, 925 F.2d 615, 618-19 (2d Cir. 1991) (" '[T]he *acts* for which Spatola was convicted, and the *actions* of the group for which Spatola as co-conspirator was liable, are clearly illegal here.' ") (emphasis added) (quoting *Spatola v. United States*, 741 F. Supp. 362, 373 (E.D.N.Y. 1990)); *see also Collins*, 259 U.S. at 311-12 ("It is enough [to satisfy the dual criminality requirement] if the particular *act* charged is criminal in both jurisdictions.") (emphasis added).

In this case, the evidence at the Italian trial showed that Lo Duca, as a member of the Sicilian Mafia in New York City, had conspired with numerous other co-conspirators to transport cocaine throughout the United States, South America, and Europe. Specifically, the evidence disclosed various shipments of cocaine over several years from Miami to New York, and one shipment of more than 550 kilograms of cocaine from Colombia to Sicily. Moreover, there was further evidence of Lo Duca's participation in another plan to ship heroin from Sicily to the United States. In light of these facts, Lo Duca's conduct clearly would have constituted a crime under either 18 U.S.C. § 371 or 18 U.S.C. § 1962 had he been prosecuted in the United States.

Conclusion

Since the United States extradition statute, 18 U.S.C. § 3184, does not violate the doctrine of separation of powers, and Lo Duca's other claims are not grounds for reversal, the judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of August, one thousand nine hundred and ninety-six.

Present: HON. JON O. NEWMAN
Chief Judge

HON. AMALYA L. KEARSE
Circuit Judges

HON. LEONARD D. WEXLER *
District Judge

Docket No: 95-2462

PAOLA LO DUCA,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from United States District Court
for the Eastern District of New York

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* Honorable Leonard D. Wexler, of the United States District Court for the Eastern District of New York, sitting by designation.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III
Clerk

By: /s/ Betty J. Meador
BETTY J. MEADOR
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-95-713 (DGT)

PAOLO LO DUCA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

AMENDED MEMORANDUM AND ORDER

Trager, District Judge:

In this petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, Paolo Lo Duca challenges the legality of an extradition order issued by United States Magistrate Judge Steven M. Gold. *See In re Extradition of Paolo Lo Duca*, No. 94-M-792 (E.D.N.Y.) (transcript of hearing on Nov. 17, 1994, at 80-90).[1] Lo Duca makes four principal arguments in support of his petition: (1) the documentary evidence submitted in support of the extradition request fails to conform to the procedural requirements of the applicable extradition treaty—Extradition Treaty between the Government of the United States of America and the Government of the Republic of Italy ("Treaty"), T.I.A.S. 10837, October 13, 1983; (2) in finding probable cause to extradite, Magistrate Judge Gold erroneously admitted and relied upon evidence completely

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[1] For simplicity sake, the extradition hearing held on November 15, 1994, will be referred to using the notation "(11/15 H. at ——)", and the heairng held on November 17, 1994, will be referred to as "(11/17 H. at ——)."

collateral to the extradition request and the underlying conviction; (3) the extradition should be stayed pending discovery on the issue of whether the government should be estopped from arguing probable cause to extradite; and (4) one of the charges of which Lo Duca was convicted in Italy—"association of mafia type"—is not an extraditable offense under the Treaty or case law on "dual criminality." In addition, Lo Duca requests that he be released on bail pending the disposition of these extradition proceedings in order that he may help care for his wife, who is in the advanced stages of Alzheimer's disease.

Background

On February 21, 1990, an arrest warrant was issued by the District Court of Palermo, Italy, charging Lo Duca with: (1) trafficking in narcotic substances in violation of Articles 81 and 110 of the Italian Penal Code and Articles 71 and 74 no. 2 of Law 685 of December 22, 1975; (2) criminal association in drug trafficking in violation of Articles 75 and 112 of Law 685; and (3) "association of [a] mafia type" in violation of Article 416 bis. of the Italian Penal Code. Based largely on the testimony of Joseph Cuffaro, a coconspirator and protected witness in the United States, Lo Duca, was convicted of conspiring to ship large quantities of cocaine between Colombia, Italy and the United States from 1983 to 1988, including a single shipment of at least 550 kilograms directly from Columbia to Sicily.

On March 24, 1993, Lo Duca was also convicted of the crime of "association of mafia type" and related narcotics charges, based on his being a member of Sicilian organized crime. Although Lo Duca was not present for the trial, he was represented by Giuseppe Giannusa, an Italian attorney who participated in all phases of the trial.[2] On March 24, 1993, the District Court of Palermo

[2] During the Italian trial, the court and all participants, including Lo Duca's attorney, traveled to Washington, D.C., to hear

sentenced Lo Duca to 25 years imprisonment and assessed a 250 million lire fine. However, on August 8, 1994, the Court of Appeals of Palermo reduced the sentence to 19 years and the fine to 200 million lire.

Pursuant to Article XII(1) of the Treaty, Italy submitted a formal request to the United States for the provisional arrest of Lo Duca. On May 26, 1994, the United States Attorney for the Eastern District of New York filed a complaint with this Court and requested that a warrant be issued for Lo Duca's arrest pursuant to 18 U.S.C. § 3184. The complaint contained all information required by Article XII(2) of the Treaty—Lo Duca's nationality; his probable location; a brief statement of the facts and evidence upon which Lo Duca was being arrested; the fact that an arrest warrant had been issued in Italy, including the date and identity of the issuing court; a list of the crimes for which Lo Duca was convicted; the identity of the sentencing court and the sentence imposed; and the fact that a formal request for extradition would follow. An arrest warrant was issued on May 26, 1994, by then Magistrate Judge Allyne R. Ross. Lo Duca was arrested on July 19, 1994.

On August 25, 1994, Lo Duca requested that he be released on bail pending his extradition hearing. Lo Duca contended that he should be released to care for his wife, who was in the advanced stages of Alzheimer's disease and was unable to care for herself. Lo Duca offered to post numerous properties to secure a high bail, and agreed to submit to house arrest and wear a monitoring bracelet. Magistrate Judge Marilyn D. Go granted Lo Duca's request and set bail at $8 million. Following the bail hearing, Lo Duca was released to house arrest, pending his extradition hearing. Mem. Opp'n at 8.

On August 30, 1994, pursuant to Article XII(4) of the Treaty, Italy formally requested that Lo Duca be

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Cuffaro's testimony. Lo Duca, who was living in Sands Point, New York, chose not to attend the proceedings in Washington.

extradited, and furnished the United States with the supporting documents as required by Article X of the Treaty. Included among the documents submitted were: (1) a document "set[ting] forth the identity and probable location of the person sought . . . [and] that the person sought is the person convicted"; (b) "a brief statement of the facts of the case;" (c) "the texts of the laws describing the essential elements [] of the offense . . . the punishment" and appropriate statute of limitations; (d) "a copy of the judgment of conviction;" (e) "a copy of the sentence;" and (f) documents establishing that the person sought is the person convicted." Treaty, art. X(2),(4). *See also* Mem. Supp. Extradition at Exh. F.

Lo Duca's extradition hearing was held before Magistrate Judge Gold on November 15, 1994. At the outset, Magistrate Judge Gold noted that although Lo Duca's counsel only raised the issues of probable cause and the Treaty's "dual criminality" requirement, it was still necessary to determine the appropriateness of the documents submitted in connection with the extradition request (11/15 H. at 10).[3] Thereafter, Magistrate Judge Gold reviewed the documents submitted in the extradition request

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[3] After being shown of an article which appeared in the *Washington Post* on November 14, 1994, Magistrate Judge Gold noted that a potential conflict was present as one of Lo Duca's attorneys —Mr. Abell—was being investigated for criminal activity by the United States government (11/15 H. at 3-4). Accordingly, Magistrate Judge Gold informed Lo Duca of the impact of the potential conflict and that it was necessary for him to consider whether he wanted to proceed with Abell, or whether he wanted to adjourn the proceeding pending the procurement of substitute counsel proficient in extradition law (11/15 H. at 4-9). *See United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982). Lo Duca conferred with his two other attorneys and stated that he understood his rights and wanted to continue with Abell present (11/15 H. at 9). However, Magistrate Judge Gold informed the parties that he would not require Lo Duca to go forward with his entire argument at that time, but would conclude the hearing on November 17, 1994, in order to give Lo Duca time to fully consider the impact of the potential conflict (11/15 H. at 10).

and found them in compliance with the Treaty's requirements (11/15 H. at 10-18). It is important to note that at no time did Lo Duca's counsel challenge the completeness of the documents (11/15 H. at 14).[4]

After reviewing the extradition documents, Magistrate Judge Gold addressed Lo Duca's claim that there was no probable cause to believe that he committed the crimes for which his extradition was being sought because the evidence presented in the Italian trial consisted solely of the testimony of an accomplice—Cuffaro (11/15 H. at 19). Lo Duca argued that Cuffaro was not a credible witness and, therefore, probable cause for the Italian conviction was lacking. Before he heard the arguments of each side, Magistrate Judge Gold noted that much of Cuffaro's testimony was corroborated by a number of factors. First, he and had already identified many other substantial targets apart from Lo Duca and, therefore, had did not have to finger Lo Duca in order to obtain the benefits promised to him by the government (11/15 H. at 19). Second, Magistrate Judge Gold noted that Cuffaro's testimony was corroborated by the fact that drugs and other evidence was seized as a result of his cooperation with the authorities and that hotel receipts, airline ticket and telephone records demonstrated that during the time of the alleged cocaine conspiracy Cuffaro "was where he said he was, and so were a couple of the other people involved" (11/15 H. at 20-21). Nevertheless, Magistrate Judge Gold asked the government to present evidence at the continuation of the extradition hearing on November 17 in response to Lo Duca's claim that Cuffaro's testimony was not credible (11/15 H. at 19-21).

After briefly addressing Lo Duca's probable cause claim, Magistrate Judge Gold addressed the claim that

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[4] For example, in response to Magistrate Judge Gold's question, "I take it, Mr. Abell, that I'm right in saying that you haven't raised a challenge to the completeness under Article 10", Lo Duca's counsel answered "No." (11/15 H. at 14).

the Treaty's "dual criminality" requirement was not met (11/15 H. at 32). Magistrate Judge Gold noted that according to *Collins v. Loiselle*, 259 U.S. 309, 311-12 (1922), only the conduct for which Lo Duca was convicted needed to be considered, not the specific wording of the statutes involved (11/15 H. at 32). Relying on the case of *Spatola v. United States*, 741 F. Supp. 362, 372 (E.D.N.Y. 1990) (Bartels, J.), *aff'd*, 925 F.25 615 (2d Cir. 1991), Magistrate Judge Gold stated that the conduct in question in the Italian trial—participation in a conspiracy to import narcotics—could be charged under analogous statutes in the United States, e.g., the Racketeer Influenced and Corrupt Organizations Act, and found that the "dual criminality" requirement had been met (11/15 H. at 32-33). However, as with the probable cause issue, Magistrate Judge Gold postponed a final determination of this issue until after the extradition hearing was to be resumed on November 17. *See supra* note 3.

Before the November 15 extradition hearing was concluded, Magistrate Judge Gold entertained the government's request to revoke Lo Duca's bail. Based on surveillance reports, the government argued that Lo Duca was caught driving without a license, arrived late to an appointment with his attorney, and violated the terms of his house arrest (11/15 H. at 35-37). In addition, the government noted that Lo Duca possessed an Illinois driver's license with a nonexistent address and an Italian driver's license with a nonexistent identification number (11/15 H. at 34-35). Magistrate Judge Gold noted although Lo Duca's conduct bordered on contempt, it was not a strong indication of risk of flight, and, therefore, denied the government's request (11/15 H. at 42-43).

Lo Duca's extradition hearing was continued on November 17, 1994.[5] At that time, Lo Duca's counsel ob-

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[5] At the beginning of the hearing, Magistrate Judge Gold asked Lo Duca whether he discussed the potential conflict with his two

jected to the introduction of any evidence to corroborate Cuffaro's testimony which was not introduced at Lo Duca's trial in Italy (11/17 H. at 11). Counsel argued that Magistrate Judge Gold could only base his decision with respect to probable cause upon the testimony which was adduced before the Italian authorities as evidenced in the documents Italy submitted in connection with its extradition request (11/17 H. at 12). Magistrate Judge Gold overruled Lo Duca's objection and noted that the additional testimony was being offered to rebut an argument that Lo Duca raised in the first place—Cuffaro's lack of credibility (11/17 H. at 12). Further, Magistrate Judge Gold noted that Article XI of the Treaty allowed the "requested party," in this case the United States, to request the submission of necessary additional information on probable cause should the original documents be deemed incomplete (11/17 H. at 13). Moreover, Magistrate Judge Gold opined that the extradition documents already contained enough corroboration of Cuffaro's testimony, and he only sought the additional testimony to explain precisely what information was contained in those documents (11/17 H. at 14-15).

After hearing the testimony of FBI Agent Anafreo Minafo, Magistrate Judge Gold noted that ("[a]ny evidence submitted in support of an extradition request . . . is deemed to be truthful, and the accused has no right to present evidence raising questions of credibility" (11/17 H. at 81) (*citing In Re Extradition of Atta*, 706 F. Supp. 1032, 1051 (E.D.N.Y. 1989); *In Re Locatelli*, 468 F.

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other attorneys and wanted to continue to be represented by Mr. Abell (11/17 H. at 3). In response, Lo Duca stated that he wanted to continue with Abell as one of his attorneys. Magistrate Judge Gold asked the same questions of the two other attorneys, who responded that they were "satisfied that [Mr. Abell] should remain on the case" (11/17 H. at 4). In addition, Magistrate Judge Gold asked Abell whether the government's investigation caused him to feel that an actual conflict between his and Lo Duca's interests was present. Abell responded that he did not feel an actual conflict was present (11/17 H. at 4).

Supp. 568, 573-74 (S.D.N.Y. 1979)). Nevertheless, Magistrate Judge Gold entertained Lo Duca's attack on Cuffaro's credibility and "listened to the government's evidence for one purpose and one purpose only [——] [n]ot to see if there was evidence which standing alone would state probable cause to support this extradition request, but rather to see whether or not Cuffaro's statements, *which in and of themselves under the law [wer]e enough to warrant extradition*, could be corroborated in any way" (11/17 H. at 82) (emphasis added). In conclusion, Magistrate Judge stated that "[t]aking together Caffaro's [sic] motives, the degree to which Caffaro [sic] has been corroborated with respect to the assertion he's made about individuals other than Loduca [sic], and finally the information provided at [the] hearing, which does provide some, albeit limited corroboration of his statements directly about Loduca [sic], I conclude that the government has established sufficient probable cause to support the extradition request of the government of Italy" (11/17 H. at 84). Magistrate Judge Gold also held that the Treaty's "dual criminality" requirement had been met with respect to the charge of "association of mafia type" (11/17 H. at 84-86). Finally, and although Magistrate Judge Gold noted that "if this were a criminal case proceeding in the United States, I would release Mr. Loduca [sic] on bail, because I find that the condition, combined with the prior history in this case, are reasonable to assure his continued appearance," he could not find any "exceptional circumstances" which would warrant bail in the context of an extradition proceeding (11/17 H. at 96). Accordingly, Magistrate Judge Gold revoked Lo Duca's bail and remanded him to the custody of the United States Marshal (11/17 H. at 97).

Discussion

The scope of review in a habeas petition challenging an extradition order is narrow. *See, e.g., Sindora v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980). Habeas review is

available only to determine whether the Magistrate Judge had jurisdiction, whether the offenses charged were extraditable under the treaty, and whether there was any evidence warranting the finding of probable cause. *See Fernandez v. Phillips,* 268 U.S. 311, 312 (1925) (Holmes, J.); *Jhirad v. Ferrandina,* 536 F.2d 478, 482 (2d Cir.), *cert. denied,* 429 U.S. 833 (1976). Such review is not a writ of error nor a means of rehearing what the magistrate judge has already decided. *See McNamara v. Henkel,* 226 U.S. 520, 525 (1913). Further, district courts generally accord substantial deference to the probable cause findings of magistrate judges. *See United States v. Travisano,* 724 F.2d 341, 345 (2d Cir. 1983); *United States v. Canestri,* 518 F.2d 269, 273 (2d Cir. 1975).

In the context of this habeas petition, Magistrate Judge Gold's factual findings must be reviewed under a clearly erroneous standard. *See Ahmad v. Wigen,* 726 F. Supp. 389, 397 (E.D.N.Y. 1989), *aff'd,* 910 F.2d 1063 (1990). However, his purely legal determinations, or mixed determinations of law and fact, must be reviewed *de novo. Id.* As stated earlier, Lo Duca raises four principal arguments in support of his petition: (1) the documentary evidence submitted in support of the extradition request fails to conform to the procedural requirements of the Treaty; (2) Magistrate Judge Gold erred in finding probable cause to extradite Lo Duca; (3) the extradition should be stayed pending discovery on the issue of whether the government should be estopped from arguing probable cause to extradite; and (4) the crime of association with a "mafia type organization" is not an extraditable offense under the Treaty or case law on "dual criminality." Lo Duca argues that all of these questions are either purely legal, or mixed questions of law and fact, and, therefore, I must review Magistrate Judge Gold's findings *de novo.* I agree.

A. Sufficiency of the Extradition Documents

Lo Duca's claim that the documentary evidence submitted in the extradition request failed to comply with the Treaty's requirements can be broken down as follows: (1) the documents were never offered or admitted into evidence at the extradition hearing; (2) the documents were not "signed by a judge or other Italian judicial authority"; (3) three required documents were missing; and (4) the provisional arrest warrant was invalid. *See* Mem. Supp. Pet. at 17-34.

To begin, these claims are beyond the scope of review of a petition for a writ of habeas corpus, see *McNamara, supra,* 226 U.S. at 525 ("the writ of habeas corpus does not operate as a writ of error and mere errors are not the subject of review"), and should be dismissed as a matter of law. *See Fernandez, supra,* 268 U.S. at 312; *Austin v. Healy,* 5 F.3d 598, 601 (2d Cir. 1993) (citing *In re Adutt,* 55 F. 376, 379 (C.C. Ill. 1893) ("defect in extradition complaint is 'not a matter going to the jurisdiction of the [magistrate] to entertain the complaint' ")), *cert. denied,*—— U.S. ——, 114 S. Ct. 1192 (1994). Further, these arguments were not raised during the extradition hearing, and should, therefore, be deemed waived. *See Jhirad, supra,* 536 F.2d at 486 ("Non-jurisdictional objections must . . . be timely raised or they are waived"). Even if the claims are considered, however, they must be rejected as they are without merit.

1. Formal Admission into Evidence of Extradition Documents

To support his claim that the Treaty was violated when the extradition documents were not offered or admitted into evidence, Lo Duca points to Articles X(5) and X(7)(b) of the Treaty, and 18 U.S.C. § 3190. Article X(5) provides that "[i]f the person sought has been convicted in absentia . . . the Requesting Party shall submit such documents as are described in paragraphs 2, 3 and 4

of this Article and a statement regarding the procedure, if any, that would be available to [him or her] if he or she were extradited." Article X(7)(b) provides that "[t]he documents which accompany an extradition request shall be admissible into evidence when . . . they are signed by a judge or other Italian judicial authority and are certified by the principal diplomatic or consular officer of the United States in Italy." Title 18, United States Code, section 3190 provides that documents which are "offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing . . ." Lo Duca claims that when read together, these provisions required all of the extradition documents to have been offered and admitted into evidence at the extradition hearing before having been considered by Magistrate Judge Gold.

Lo Duca argues that without a formal admission requirement, these provisions would be superfluous. *See* Mem. Supp. Pet. at 18. In addition, Lo Duca claims that "anything less than formal admission would be inconsistent with the Court's duty to scrutinize carefully the documents for compliance with the law and the Treaty." *Id.* Further, Lo Duca argues that a lesser procedure would frustrate habeas corpus review of extradition determinations as there would be no record for the district court to review. *Id.* Finally, Lo Duca claims that formal admission requirement would prevent the Treaty from being circumvented by the informal submission of improperly signed or certified documents to the Magistrate. *Id.* Lo Duca's argument must be rejected.

Although Lo Duca's argument with respect to the "common sense interpretation" of the Treaty and extradition statute is not unreasonable, Mem. Supp. at 18, the Treaty and statute should not be read so narrowly. Extradition treaties must be construed liberally to achieve their purpose of providing for the surrender of fugitives to the requesting countries. *See Valentine v. United States ex. rel.*

Neidecker, 299 U.S. 5, 19 (1936); *United States v. Cancino-Perez*, 151 F.R.D. 521, 523 (E.D.N.Y. 1993). In construing such treaties, "[f]orm is not to be insisted upon beyond the requirements of safety and justice." *Fernandez, supra*, 268 U.S. at 312. *See also United States ex rel. Rauch v. Stockinger*, 269 F.2d 681, 687 (2d Cir.), *cert. denied*, 361 U.S. 913 (1959). Thus, while the Treaty and statute allow for the formal admission of extradition documents, there is no explicit requirement that such documents be admitted into evidence before being considered by the magistrate judge. Lo Duca's argument places form over the requirements of "safety and justice."

In addition, it is interesting to note that although Magistrate Judge Gold never explicitly stated that the extradition documents were "received into evidence," on one occasion he referred to the documents "which were admitted into evidence at the proceeding we had this afternoon" (11/17 H. at 80). Lo Duca's attorneys did not take issue with this characterization of the status of the documents as "evidence" in the extradition hearing. Therefore, both de facto and de jure, the documents were offered and admitted into evidence at the hearing.

In any event, the documents submitted by a requesting country need not have been admitted into evidence at an extradition hearing to be considered by a district court sitting in habeas corpus review. In the same way that state court transcripts, appellate briefs, memoranda in support and opposition, and other "documentary evidence" can be considered by a district court sitting in review of a petition for a writ of habeas corpus without having been formally admitted into evidence in the state court proceedings or a subsequent evidentiary hearing on the petition, so can the documents submitted along with the government's extradition request. *See* Rules 5 and 7 of the Rules Governing § 2254 Cases (1995). *See also Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Pocaro v. United*

States, 784 F.2d 38, 41 (1st Cir.), *cert. denied,* 479 U.S. 916 (1986); *Harris v. Pulley,* 692 F.2d 1189, 1199-200 (9th Cir. 1982), *rev'd on other grounds,* 465 U.S. 37 (1984); *United States v. Carlino,* 400 F.2d 56, 58 (2d Cir. 1968), *cert. denied,* 394 U.S. 1013 (1069). In this case it is clear which documents Magistrate Judge Gold relied upon in reaching his determination that Lo Duca was extraditable—all of the documents annexed to the government's memorandum in support of the extradition request and submitted to him at the hearing. These documents are all part of the files which this Court can review in reaching a decision. Accordingly, the failure to formally admit the extraditon documents into evidence in no way frustrates habeas corpus review of Magistrate Judge Gold's order.

2. Certification by Italian Judicial Authority

Lo Duca also argues that even if the documents were offered and admitted into evidence, the bulk of the documents were, nevertheless, inadmissible because there was no proof that they were signed by an "Italian judicial authority" as required by Article X(7)(b) of the Treaty. Lo Duca notes that although the documents "bear the imprimatur of the Palermo prosecutor's office . . . there is no proof in this record that the Palermo prosecutor is a [sic] 'Italian judicial authority'" under Italian law. Mem. Supp. Pet. at 24. Lo Duca argues that "it was incumbent upon the government . . . to clarify or define [the] term [judicial authority] and to prove that it embraced the Palermo prosecutor." Mem. Supp. at 26. In addition, Lo Duca cites to a number of cases which he claims indicate that an Italian prosecutor is not an Italian judicial authority. *Id.* at 25. Further, Lo Duca notes that Magistrate Judge Gold did not make an independent inquiry or finding on this issue. As a consequence, Lo Duca argues that the extradition order is flawed and must be reversed. This argument is misplaced and must be rejected.

If formal admission of the documents had been necessary, contrary to Lo Duca's claims, the documents submitted by Italy would have been admissible pursuant to Article X(7)(b) of the Treaty. Although Lo Duca is correct in stating that the government did not prove that the term judicial authority "embraced" the Palermo prosecutor, and that Magistrate Judge Gold did not make a specific finding that all of the documents were signed by an Italian judicial authority, the documents, nevertheless, did satisfy the requirements of the Treaty. Pursuant to Fed. R. Civ. P. 44.1, district courts have the authority to make an independent determination of foreign law. In so doing, courts "may consider any relevant material or source . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1 (1995). Under Italian law, public prosecutors are considered part of the judiciary, and, therefore, are "judicial authorities" within the meaning of Article X(7)b) of the Treaty. *See* Constituzione, art. 104 (Italy); Stephen P. Freccero, An Introduction to the New Italian Criminal Procedure, 21 Am. J. Crim. L. 345, 355 (1994). This fact is noted in the government's reply to Lo Duca's petition. *See* Mem. Opp'n at 29-30. The August 8 diplomatic note from the Italian Embassy clearly states that an Italian public prosecutor is a judicial authority under Italian law.[6] Accordingly, Lo Duca's argument is rejected.

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[6] The letter reads:

> [W]ith respect to Article 10, paragraph 6 [sic] of said Treaty, the Embassy of Italy would take this opportunity to confirm that in the Italian legal system the office of "public prosecutor" (*pubblico ministero*) falls under the Judiciary and thus *a Procuratore della Repubblica (an officer exercising the functions of the Pubblico Ministero) is a judicial authority* as referenced in letter b. More specifically, Decree Law 12 of 30 January 1941 as amended by Presidential Decree 449 of 22 September 1988—the Judicial Order establishes the structure of the Judiciary. Title One, Section I lists those invested with

3. Missing Documents

Lo Duca also argues that "at least three of the necessary documents" required to be submitted by Italy along with the extradition request pursuant to Article X of the Treaty were "missing." Mem. Supp. at 20. Specifically, Lo Duca claims that the following were not submitted to Magistrate Judge Gold at the extradition hearing: (1) a copy of the judgment of conviction; (2) a copy of the sentence and a statement as to the duration of the sentence; and (3) a statement regarding the procedures available to the relator to contest his or her conviction and sentence. *See* Mem. Supp. Pet. at 21-24; Treaty art.'s X(4)(a) & (b), X(5). Accordingly, Lo Duca argues that Magistrate Judge Gold's extradition request should be reversed.

Lo Duca's argument must be rejected as a careful examination of the documents submitted along with the extradition request indicates that all the necessary documents were submitted by Italy. A copy of the judgment of conviction and sentence appear as Exhibit E to the government's memorandum in support of Lo Duca's extradition, and are part of Court Exhibit 3. This document, entitled *"Tribunale Civile E Penale Di Palermo Sezion V, Sentenza Emessa Nel Procedimento Penale, Contro Aponte Romero Waldino +14, Vol. 1,"* accompanied the extradition request and was submitted to and certified by the United States Embassy in Rome on August 2, 1994. The English translation of this document reads "Law Court of Palermo V Division, Sentence Issued In The Criminal Proceedings Against Aponte Romero Waldino + 14, Vol. 1."

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judicial powers and Article 2 therein expressly refers to the *pubblico ministero*. Subsequent Title Three is entitled *Publico Ministero* and Article 70 thereunder expressly indicates that the functions of the *pubblico ministero* are exercised by the *procuratori della Repubblica*.

(emphasis added).

As the Italian Embassy states in a diplomatic note of March 8, 1995:

> [I]n the Italian legal system a "judgement [sic] of conviction" . . . and a "sentence" . . . are combined into one judgment (*sentenza di condanna*) handed down by the Court as set out in article 533 of the [Italian] Criminal Procedures Code. Accordingly, the official Italian version of the Treaty makes no distinction between letter a [of Article X, paragraph 4, of the extradition treaty] (*sentenza di condanna*) and letter b (*sentenza*).

Mem. Opp'n at Exh. 3.

Although Lo Duca argues that the *Sentenza Emessa Nel Procedimento Penale* was not specifically referred to by the government at the extradition hearing, nor noted by Magistrate Judge Gold as satisfying the requirements of Article X(4), see Reply Mem. Supp. at 10-11, it, nevertheless, did satisfy those requirements. Is is undisputed that this document complies with the Treaty's requirements under Article X(4) and was submitted by Italy along with the extradition request. That is all that the Treaty requires. Further, and contrary to Lo Duca's assertion, the diplomatic note from the Italian Embassy is not "new evidence," but merely an explanation of what was in the record of the extradition hearing. As stated earlier, district courts have the discretion to consider such notes in determination on foreign law. *See* Fed. R. Civ. P. 44.1 (1995). In addition, even though Lo Duca is correct in asserting that the government did not prove that the Palermo prosecutor was an Italian judicial authority and Magistrate Judge Gold failed to make such a finding, as this is a mixed question of law and fact, *de novo* review of the "evidence" is appropriate. Based on a review of all of the "evidence" in this case, it is clear that the *Sentenza Emessa Nel Procedimento Penale* was submitted by Italy along with the extradition request, and

that the document satisfies the requirements of Article X(4).[7]

Similarly, and also contrary to Lo Duca's assertion, see Mem. Supp. at 24, "a statement regarding the procedures, if any, that would be available to the person" convicted in absentia to appeal the conviction was submitted by Italy, and was before Magistrate Judge Gold during the extradition hearing. *See* Treaty, art X(5). Such a statement appears in Exhibit F to the government's extradition memorandum, which reads, "Mr. Paolo LO DUCA could still appeal his last sentence by applying with the Court of Cassation within the deadline." Although the statement appears in another diplomatic note from the Italian Embassy, and was not submitted concurrently with the extradition request, it was submitted following the Court of Appeal's decision on Lo Duca's appeal of his conviction, and was sufficient to comply with the Treaty's requirements. *See* Treaty, arts. XI(1) (submission of additional extradition documents permitted), X(5).

Lo Duca challenges the sufficiency of this diplomatic note on five grounds: (1) formal reception of the diplomatic note into evidence rather than mere submission to the State Department was necessary for it to be considered by Magistrate Gold; (2) the diplomatic note is not signed by an Italian judicial authority; (3) "the Treaty does not say submission to the 'Executive Authority,' rather than the Court"; (4) there is no copy of the note

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[7] Lo Duca also argues that the extradition request is faulty in that Italy only submitted a copy of the vacated sentence along with the extradition request rather than the sentence issued by the Court of Appeal. This argument too must be rejected. The original sentence issued by the Court of Palermo was transmitted to the State Department on August 2, 1994, almost one week before the Court of Appeal reduced the sentence. In any event, Italy submitted the modified sentence shortly after it was issued. Subsequent submissions of additional documents following the original extradition request is permitted by the Treaty. *See* Treaty, art. XI(1).

in Italian pursuant to Article X(6) of the Treaty; and (5) the single relevant sentence in the diplomatic note was insufficient to comply with the Treaty's requirements. Reply Mem. Supp. at 13-14. These arguments are without merit.

First, although the statement of available procedures was not submitted concurrently with the other documents in support of the extradition request, it, nevertheless, complied with the Treaty's requirements for the submission of supporting documentation. Article XI(1) of the Treaty provides:

> If the Requested Party considers that the documentation furnished in support of a request for extradition in incomplete or otherwise does not conform to the requirements of this Treaty, that Party shall request the submission of necessary additional documentation. The Requested Party shall set a reasonable time limit for the submission of such documentation, and shall grant a reasonable extension of that time limit upon an application by the Requesting Party . . .

Further, as was stated above, the documents submitted in connection with an extradition request need not be formally admitted into evidence to be considered by a magistrate judge or district court sitting in habeas review. *See* Rules 5 and 7 of the Rules Governing § 2254 Cases (1995); *Murray, supra,* 477 U.S. at 487. In addition, as stated above, although Article X(7)(b) clearly requires that the documents be signed by an Italian judicial authority before they can be admitted into evidence, there is no requirement that the documents must be signed by such an authority before they can be considered by the Department of State, or the hearing court. *See* Treaty, art. X(7)(b); *Fernandez, supra,* 268 U.S. at 312. Also, the Treaty does require that an extradition request must first be submitted to the State Department, not to the judiciary. *See* Treaty, art. X(1). As section 1 of Article X clearly states, "[r]equests for extradition shall be made

through the *diplomatic channel*" (emphasis added)—the State Department. Further, the mere absence of an Italian translation in no way frustrates a court's review of the documents. If the situation were reversed—only an Italian version were submitted to the State Department—Lo Duca's argument might have merit, but such is not the case. As it stands, Lo Duca's argument again places form over substance. Finally, a single statement as to Lo Duca's available procedures to appeal his conviction and/or sentence is sufficient to comply with the Treaty. *See* Treaty, art. X(5). Contrary to Lo Duca's claim, the statement of available procedures required pursuant to Article X(5) need not "allude to, for example, any post-conviction remedies" available under Italian law. Reply Mem. Supp. at 14. Such a broad reading of the Treaty is not warranted and is contrary to long established extradition jurisprudence. *See Valentine, supra,* 299 U.S. at 19.

4. Provisional Arrest Warrant

Lo Duca's final argument with respect to the sufficiency of the extradition documents concerns the provisional arrest warrant. As stated above, the government provisionally arrested Lo Duca on July 19, 1994. Lo Duca contends that the application for the provisional arrest warrant: (1) violated Treaty Article XII(1), in that there was no showing of "urgency" to support the warrant; (2) did not include all the information required by Article XII(2) of the Treaty. Lo Duca also argues that even if valid, the provisional arrest warrant must be terminated as Italy did not submit all of the required documents in support of the extradition request within 45 days following his provisional arrest as required by Article XII(4). Accordingly, Lo Duca contends that he must be released and the government must "begin the extradition from scratch." *Id.* Lo Duca's arguments must be rejected.

First, the issue of urgency for a provisional arrest warrant is not subject to judicial review. *See In re Extradi-*

tion of Hamilton-Byrne, 831 F. Supp. 287, 293 (S.D.N.Y. 1993). Even if such a claim were subject to review, however, Lo Duca's argument would be misplaced. Although provisional arrest warrants may only be *requested* "[i]n [the] case of urgency," Treaty, art. XII(1), there is no requirement that a requesting party *affirmatively demonstrate* the urgency for the provisional arrest. *See United States v. Messina*, 566 F. Supp. 740, 743 (E.D.N.Y. 1983) (under the Treaty, "[t]here is no explicit requirement that the application [for a provisional arrest warrant] include information showing the case to be one of 'urgency' "). Therefore, a court need not make a specific finding or urgency to issue a provisional arrest warrant. *See id. But see Caltagirone v. Grant*, 629 F.2d 739, 744 n.10 (2d Cir. 1980) (without reaching the question, the Court expressed its reservations concerning district court's "reluctance" to review Italy's justification for requesting a provisional arrest warrant).

Second, contrary to Lo Duca's assertion, the government's application for the provisional arrest warrant included all of the information required by Article XII(2) of the Treaty. Article XII(2) requires that an application for a provisional arrest be accompanied by information sufficient to establish: (1) the person's nationality and probable location; (2) a brief statement of the facts, time and location of the offense; (3) the available evidence; (4) a statement of the existence of an arrest warrant, with the date it was issued and the name of the issuing court; (5) a description of the type of offense; (6) a statement of the existence of a judgment of conviction, with the date of conviction and the name of the sentencing court; and (7) a statement that a formal request for extradition will follow. A careful review of the record indicates that all of this information was included in the government's complaint. *See* Mem. Opp'n at 31-32. Further, and again contray to Lo Duca's assertion, the government is permitted to rely exclusively on the complaint to support the application for a provisional arrest

warrant and is not required to submit the documents originally submitted by the Reqesting Party. *See Yordi v. Nolte,* 215 U.S. 227, 230 (1909); *United States ex rel. Petrushansky v. Marasco,* 325 F.2d 562, 564 (2d Cir. 1963), *cert. denied,* 376 U.S. 952 (1964).

Finally, the extradition request and supporting documents were received within the 45 days of the provisional arrest as provided for by Article XI(3). Article XI(3) requires that the provisional request be terminated if after 45 days, "the Executive Authority of the Requested Party has not received a formal request for extradition and the supporting documents required by Article X." As stated above, Lo Duca was arrested on July 19, 1994. Italy submitted the original request for Lo Duca's extradition along with the supporting documentation on August 30, 1994, within the 45 day period.

Even though there was an additional submission of documents following the original extradition request, and the documents were not certified by the State Department until November 14, 1994, Lo Duca's final argument must also be rejected. The date on which the documents in support of an extradition request were certified is not the date which determines whether the Requesting Party has complied with the 45 day requirement of Article XII (1). *See Cancino-Perez, supra,* 151 F.R.D. at 524 n.3 (date government receives extradition request and documents controls). In addition, only the Italian arrest warrant need be certified, not all of the documents submitted along with the extradition request. *Compare* Treaty, art. X(3)(a) *with* Treaty, art. X(1), (2), and (4)-(7). Further, even if all of the required documents were not submitted with the original extradition request, Article XI(1) provides for additional time to submit supplemental documentation. Moreover, Article XI(2) provides, "[i]f the person sought is in custody and the additional documentation submitted is incomplete or otherwise does not conform to the requirements of this Treaty . . . [the] per-

son *may* be discharged from custody" (emphasis added). Accordingly, there is no requirement that the relator must be released if the Requesting Party's supplemental documentation in support of the extradition request is submitted beyond the 45 day period established by Article XI(1). *See Kostkotas v. Roche*, 740 F. Supp. 904, 915-16 (D. Mass. 1990) (extradition sustained where supplemental and additional documentation received after 45 day period expired), *aff'd*, 931 F.2d 169 (1st Cir. 1991); *United States v. Sensi*, 664 F. Supp. 566, 569 (D.D.C. 1987) (court found no fault when "the United States initially submitted material supporting extradition within the forty-five day period, and [where] there [was] nothing in the record to indicate the government unreasonably delayed sending the additional requested material."), *aff'd*, 879 F.2d 888 (D.C. Cir. 1989); *United States ex rel. Eatessmai v. Marasco*, 275 F. Supp. 492, 495 (S.D.N.Y.) (amended complaint filed after 45 day period expired).

B. Probable Cause to Extradite

Lo Duca argues that Magistrate Judge Gold erred when he relied upon Agent Minafo's testimony to find probable cause to extradite. *See* Mem. Supp. Pet. at 34. Although Lo Duca admits that " 'the record in an extradition proceeding' is not necessarily restricted 'to the documentary submissions by the requesting government,' " Mem. Supp. Pet. at 35 (*quoting Galan Valencia v. Scott*, Nos. CV-90-3745, CV-91-1959, 1992 WL 75036, *2 (E.D.N.Y. Mar. 24, 1992) (Dearie, J.)), he argues that supplementation of the extradition documents is limited to situations where: (1) expert testimony on legal issues is needed; and (2) identification testimony is needed. *Id.* Lo Duca claims that Agent Minafo's testimony was the "pillar" of Magistrate Judge Gold's probable cause determination, and the admission of that testimony went beyond what other courts have allowed to supplement the documentary evidence in an extradition hearing. *Id.* at 36-37. Lo Duca's argument must be rejected.

Unlike a criminal trial, an extradition proceeding is not intended to adjudicate an accused's guilt or innocence. *See Jhirad, supra,* 536 F.2d at 482. The sole purpose of such a proceeding is to determine whether the evidence submitted is sufficient to justify extradition according to the treaty. In addition, neither the Federal Rules of Evidence nor Criminal Procedure are applicable in extradition proceedings. *See Messina v. United States,* 728 F.2d 77, 80 (2d Cir. 1984); *Simmons v. Braun,* 627 F.2d 635, 636 (2d Cir. 1980). A finding of probable cause to extradite merely requires evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt," *Atta, supra* 706 F. Supp. at 1050, and a magistrate judge's determination of probable cause will be sustained as long as *any evidence exists* to support the findings. *See United States v. Smith,* 9 F.3d 1007, 1011 (2d Cir. 1993) (probable cause determination subject to *de novo* review); *Spatola, supra* 741 F. Supp. at 373.

It is important to note that the issues with respect to probable cause came about as the result of Lo Duca's attack on Cuffaro's credibility during the November 15 hearing, something which is normally inappropriate in the context of an extradition proceeding. *See Shapiro v. Ferrandina,* 478 F.2d 894, 905 (2d Cir.) (Friendly, C.J.) (relator's right to introduce evidence is limited to testimony which *explains* rather than *contradicts* requesting country's proof), *cert. dism'd,* 414 U.S. 884 (1973). In any event, contrary to Lo Duca's contentions, the statutory provisions and case law in no way restrict the record in an extradition proceeding to the documentary evidence submitted by the requesting country, or to the limited supplementation of the record only with expert and identification testimony. *See, e.g.,* 18 U.S.C. § 3184 (1995); *In re Extradition of Greer,* No. Misc. 91-90, 1991 WL 311924, *6 (D.Vt. Nov. 20, 1991) (court admitted the testimony from requesting country's investigating officers,

written statements from accomplices, and the testimony of a United States Customs agent and State Department official); *Gill v. Imundi.*, 747 F. Supp. 1028, 1032 (S.D.N.Y. 1990) (in addition to testimony by United States fingerprint expert, court admitted testimony of United States agent who took statement from accused after his arrest); *In re Extradition of Artukovic,* 628 F. Supp. 1370, 1376 (C.D. Cal. 1986) (government permitted to introduce requesting country's criminal statutes not submitted along with original extradition request in addition to translations which were not certified by the United States Ambassador pursuant to 18 U.S.C. § 3190). Accordingly, given the flexibility with which extradition proceedings are conducted, it was entirely appropriate for Magistrate Judge Gold to entertain Agent Minafo's testimony to corroborate Cuffaro's testimony, even though such corroboration was unnecessary.

In any event, even if it were necessary to corroborate Cuffaro's testimony, Magistrate Judge Gold had before him abundant documentary evidence from which he could do so, and also find probable cause to extradite, even without considering Agent Minaro's testimony (11/15 H. at 19-22). Two days before he heard the Agent's testimony, Magistrate Judge Gold noted that, based on the extradition documents, Cuffaro's testimony was corroborated because he was:

> a witness who ha[d] been subjected to cross examination, including cross examination by counsel appointed for Mr. Loduca [sic] . . . who ha[d] a cooperation agreement and [wa]s in the witness protection program, and therefore ha[d] some risk, should he be determined to be lying. And . . . who ha[d] identified many other substantial targets, apart from Mr. Loduca [sic], and therefore did not necessarily have to finger Mr. Loduca [sic] in order to obtain the substantial benefits that [we]re attributed to him. . .

(11/15 H. at 19). Further, Magistrate Judge Gold noted that Cuffaro's testimony was corroborated because the "drug transaction took place, and in fact there was a search, which revealed either drugs or drug records that stemmed from Mr. Caffaro's [sic] statements" (11/15 H. at 20). At the close of the extradition hearing, Magistrate Judge Gold stated:

> it's not completely accurate to say that there is no corroborating information [in the documents] pertaining directly to Loduca [sic]. Although not particularly persuasive in and of itself, the report of the Attorney of Palermo does state that Loduca [sic] has been the subject of several investigations and that these investigations have established his close contacts with several people who have been convicted of narcotics trafficking.

(11/17 H. at 81-82). Accordingly, the above statements make it clear that Magistrate Judge Gold did not base his probable cause determination solely, or even primarily on Agent Minafo's testimony; and, in any case, there was other evidence in the record from which he could find probable cause to extradite. Lo Duca's probable cause argument is, therefore, rejected. *See Fernandez, supra,* 268 U.S. at 312; *Smith, supra,* 9 F.3d at 1011.

C. Collateral Estoppel

Lo Duca claims that his participation in the alleged narcotics conspiracy was investigated by the United States government for years, and that his participation in the conspiracy was even the subject of a grand jury proceeding in the United States. However, as he was never indicted by a United States grand jury, Lo Duca argues that the government should be estopped from asserting probable cause for the Italian conviction which concerned the same conduct for which he was investigated in the United States. In the alternative, Lo Duca argues that his

extradition should be stayed pending discovery on this issue, and whether the grand jury returned a "no true bill" with respect to him. These arguments must be rejected.

Although the doctrine of collateral estoppel applies to the government in criminal prosecutions and may preclude the relitigation of issues already decided by a valid final judgment, see, e.g., *United States v. Ustica*, 847 F.2d 42, 49 (2d Cir. 1988), the failure of the grand jury to indict is not a valid final judgment, and does not act as a bar to a subsequent prosecution for offenses arising from the same criminal episode originally investigated by the government. *See United States v. Cadarr*, 197 U.S. 475, 478 (1905) ("At the common law, and in the absence of special statutes of limitations, the mere failure to find an indictment will not operate to discharge the accused from the offense, nor will a *nolle prosequi* entered by the government, or the failure of the grand jury to indict"). *See also United States v. Napolitano*, 761 F.2d 135, 137 (2d Cir.) (18 U.S.C. § 3162(a)(1) does not bar subsequent prosecution for charges arising from same criminal conduct even if government failed to procure indictment within 30 days of the arrest), *cert. denied*, 474 U.S. 842 (1985); *United States v. Jervey*, 630 F. Supp. 695, 697-98 (S.D. N.Y. 1986) (same). The cases cited by Lo Duca involved situations in which prior convictions had been reversed on appeal and the doctrine of double jeopardy precluded the government from retrying the defendants on the same charges. *See, e.g., Ustica, supra*, 847 F.2d at 49; *United States v. Levasseur*, 699 F. Supp. 965, 973 (D. Mass.), *rev'd on factual grounds*, 846 F.2d 786 (1st Cir.), *cert. denied*, 488 U.S. 894 (1988). None of the cases, however, involved the failure of a grand jury to indict a defendant, and the government's subsequent inability to prosecute.

Further, although discovery is available in an extradition proceeding, it is not a right of the relator and is

at the discretion of the district court. *See Jhirad, supra,* 536 F.2d at 484. As the results of the grand jury proceedings of which Lo Duca was the subject are irrelevant to the issue of probable cause for his extradition, discovery is not appropriate in this case. Therefore, Lo Duca's arguments are rejected.

D. Dual Criminality

Lo Duca argues that the Treaty's "dual criminality" requirement has not been satisfied. As with most extradition treaties, the Treaty requires that the offenses for which the relator's extradition is sought must be punishable under both Italian and United States law. *See* Treaty, art. II(1). Lo Duca argues that Magistrate Judge Gold erred when he analogized the Italian crime of "Association of mafia type" with a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*; and that unlike RICO, "Association of mafia type" punishes "mere association" rather than overt and culpable conduct. *See* Mem. Supp. at 39. Lo Duca's argument must be rejected.

The dual criminality requirement of an extradition treaty does not require that the names of the crimes in the two countries be the same, or that the scope of liability be coextensive. *See Collins v. Loisel,* 259 U.S. 309, 311-12 (1922). All that is required is that the particular acts charged be criminal in both jurisdictions. *Id.* Here, the acts for which Lo Duca was convicted in Italy—engaging in a conspiracy to import and distribute cocaine within a "Association of mafia type"—are also criminal in the United States. *See* 18 U.S.C. § 1961, *et seq.* (1995); 21 U.S.C. § 848 (1995). Although the name of the particular crimes for which Lo Duca was convicted in Italy is different—"Association of mafia type"—and involves added criminal liability for engaging in illegal activity within such an organization, the Treaty's dual criminality

requirement is, nevertheless, satisfied. Even though RICO does not use the term "Mafia," it does encompass added criminal liability for engaging in illegal activity within an "enterprise." *See* 18 U.S.C. §§ 1961(1) & (4), 1962(c). Again, Lo Duca's argument places form over substance and is rejected. *See Spatola, supra,* 741 F. Supp. at 372 (analyzing the extraditability for a similar Italian offense —"assocation" to commit drug trafficking).

E. Bail Application

Finally, Lo Duca's renewed application for bail pending the final resolution of these extradition proceedings must be denied. It is important to note that the appropriateness of bail in extradition cases is determined independently of any statute, e.g., the Bail Reform Act. *See In re Mitchell,* 171 F. 289 (S.D.N.Y. 1909) (L. Hand, J.). The "standard for release on bail for persons involved in extradition proceedings is a more demanding standard than that for ordinary accused criminals awaiting trial," and, therefore, the normal presumption in favor of bail is not applicable. *Hu Yau-Leung v. Soscia,* 649 F.2d 914, 920 (2d Cir.) (*citing Wright v. Henkel,* 190 U.S. 40, 62 (1903)), *cert. denied,* 454 U.S. 971 (1981). In fact, because of the United States' obligations arising under extradition treaties, a presumption against bail exists in extradition proceedings and only the existence of "special circumstances" will justify granting such an application. *See, e.g., Wright, supra,* 190 U.S. at 63; *Hu Yau-Leung, supra,* 649 F.2d at 920.

Under the special circumstances standard, admission to bail "should be an unusual and extraordinary thing," *United States ex rel. McNamara v. Henkel,* 46 F.2d 84 (S.D.N.Y. 1912), and courts should exercise the power sparingly. *In re Klein,* 46 F.2d 85 (S.D.N.Y. 1930). The cases which discuss the special circumstances standard have limited bail to situations where "the justification is

pressing as well as plain," *id.*, or "in the most pressing circumstances, and when the requirements of justice are absolutely peremptory." *Mitchell, supra,* 171 F. at 289. Courts have held that special circumstances are present when the relator has: (1) raised substantial claims which have a high probability of success on the merits; (2) suffered a serious deterioration of health; (3) shown that there is an unusual delay in the appeals process; (4) shown that the extradition proceeding will be unusually long and complex; (5) shown that the requesting country would grant bail in a comparable extradition case; and (6) shown by clear and convincing evidence that bail is available for the substantive offense in the requesting country. *See In re Extradition of Kamel Nacif-Borge,* 829 F. Supp. 1210, 1216-19 (D. Nev. 1993) (citations omitted).

Lo Duca argues that his wife's condition of advanced alzheimer's dementia constitutes a "special circumstance" which warrants his release on bail. Lo Duca claims that for years he has been his wife's indispensable caretaker, bathing her, feeding her, dressing her, giving her medications as needed, and providing round-the-clock love and support. Lo Duca also claims that his presence at home is advantageous to his wife's condition in that he has a "calming affect on her." In addition, Lo Duca argues that the need to arrange for his wife's care in his potential absence makes the granting of bail "all the more imperative." Further, Lo Duca points to the fact that, due to his confinement, his son has been forced to become Mrs. Lo Duca's primary caretaker, which places an undue burden on him. Finally, Lo Duca argues that he is not a flight risk.

Although Mrs. Lo Duca's condition is unfortunate and places an undue burden on her family, particularly her son, it does not constitute a special circumstance sufficient to overcome the presumption against bail in extradition cases. Mrs. Lo Duca's condition is not a justification which is "pressing as well as plain" as she is being ade-

quately cared for by her son, other members of the family, and a housekeeper. A review of the case law has failed to uncover any case in which the poor health of a member of the relator's family has been held to be a special circumstance sufficient to warrant the granting of bail. In addition, Lo Duca has not alleged any of the above factors which other courts have held to be sufficient to overcome the presumption against bail in extradition cases. Further, the absence of risk of flight, even if true, is not a legally cognizable "special circumstance" to justify release on bail in an extradition case. *See, e.g., Salerno v. United States,* 878 F.2d 317, 318 (9th Cir. 1989); *United States v. Leitner,* 784 F.2d 159, 161 (2d Cir. 1986); *In re Extradition of Rouvier,* 839 F. Supp. 537, 539 (N.D. Ill. 1993); *United States v. Taitz,* 130 F.R.D. 442, 444-45 (S.D. Cal. 1990); *In re Extradition of Russell,* 647 F. Supp. 1044, 1049-50 (S.D. Tex.), *aff'd,* 805 F.2d 1215 (1986). Accordingly, Lo Duca's application for bail is denied.

Conclusion

The petition for a writ of habeas corpus is dismissed. Further, Lo Duca's application for bail pending the final resolution of these extradition proceedings is denied.

Dated: Brooklyn, New York
July 18, 1995

SO ORDERED:

/s/ David G. Trager
DAVID G. TRAGER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

94-M-792

IN RE: THE EXTRADITION OF PAOLO LODUCA

November 17, 1994
Brooklyn, New York

TRANSCRIPT OF CRIMINAL CAUSE FOR EXTRADITION HEARING
BEFORE THE HONORABLE STEVEN M. GOLD
UNITED STATES MAGISTRATE JUDGE

* * * *

[80] THE COURT: Caffaro was undoubtedly advised that were he caught in a lie, he would lose the benefits of his cooperation agreement and be removed from the witness protection program. Cafarro has provided information in several trials and implicated several major targets. Some in fact have entered pleas of guilty, which further corroborates Cafarro's truthfulness. The government provided details in this regard today, indicating that Cafarro's testimony has contributed, at least to some degree, to convictions of drug dealers in 4 districts, the southern district of New York, the eastern district of Pennsylvania, and federal courts in Miami and Tallahassee, Florida.

This also demonstrates that Cafarro didn't have to implicate Loduca to establish his value to law enforcement.

[81] He had ample other information to provide in which law enforcement was undoubtedly interested. Loduca points to Cafarro's prior testimony in these other cases, and certain alleged inconsistencies in it. Any evidence submitted in support of an extradition request, however, is deemed to be truthful, and the accused has no right to present evidence raising questions of credibility. See *Matter of Extradition of Atta,* A-t-t-a, 706 F Sup 1032 at 1051, eastern district of New York 1989, and *Matter of Locatelli* (ph.), 468 F Sup 568 at 573, 574, southern district of New York 1979.

In addition, I have reviewed many of the alleged inconsistencies which Loduca says characterize Cafarro's testimony, and I don't find them to be compelling evidence that Cafarro is untrustworthy. For example, Loduca points to Cafarro's statement on one occasion that he met with Loduca at Loduca's house several times, and on another that he'd been there about 20 times. Loduca characterizes as inconsistent Cafarro's description of Loduca's home on one occasion as a mansion or plush estate, and on the other as a really luxurious expensive house, worth about 15 million dollars. I find these distinctions to be without meaningful difference.

Finally, it's not completely accurate to say that there is no corroborating information pertaining directly to Loduca. Although not particularly persuasive in and of itself, the report of the Attorney of Palmero does state that [82] Loduca has been the subject of several investigations, and that these investigations have established his close contacts with several people who have been convicted of narcotics trafficking. At today's hearing, the government amplified on this allegation.

I listened to the government's evidence for one purpose and one purpose only. Not to see if there was evidence which standing alone would state probable cause to support this extradition request, but rather to see whether or not Cafarro's statements, which in and of themselves under the law are enough to warrant extradition, could be corroborated in any way. Much of the evidence I heard

was too diminimist to warrant any discussion or to rely on at all, and none of it was extremely significant, but there are two facts which emerge, which I find to be persuasive in their corroboration of Cafarro.

First of all, the government points to Cafarro's statements that he delivered cocaine on behalf of Mr. Loduca to one Lorenzo Manino (ph.). Manino was subsequently arrested, and Loduca's telephone numbers were found in his address book. Now not only does that corroborate to some degree Mr. Cafarro's statements in that it establishes a relationship between Loduca and Manino, but it also says something about Mr. Cafarro's motive that I have in mind.

And that is that when Mr. Cafarro provided [83] information about people to the government, he undoubtedly anticipated that many of these people would be arrested. He undoubtedly further anticipated that there was at least a significant likelihood that some of the people arrested would provide cooperation to the government. If Cafarro were providing fabricated information about people who knew Loduca or about people in general, and those people subsequently began to cooperate with the government, Cafarro was running a great risk of being made out a liar and thrown out of the witness protection program and being further prosecuted. Particularly because he didn't need Loduca to get his deal in light of the other people he's implicated, I don't think he would have taken that risk.

Although of much lesser significance, I also find it somewhat corroborating that Loduca has been frequently seen over the years in the company of a number of people who have been persuasively tied to narcotics trafficking. Hung juries, minor role in trials aside, Loduca has been frequently seen with people who have been indicted for narcotics trafficking, and many of whom have been convicted either after trial or upon plea of guilty. Although standing alone this would mean almost nothing to me, with the other evidence in the record, it does have some value in corroborating Cafarro's statements.

Before certifying an extradition order, a court must analyze whether or not there is probable cause to believe that [84] the relator committed the acts alleged in the extradition request. This finding does not require a prediction of conviction, but merely sufficient evidence to support a reasonable belief that the relator is guilty of the crimes with which he's been charged. *Spitolo versus United States*, 925 F 2nd 615 at 618, Second Circuit 1991.

Taking together Cafarro's motives, the degree to which Cafarro has been corroborated with respect to the assertions he's made about individuals other than Loduca, and finally the information provided at today's hearing, which does provide some, albeit limited corroboration of his statements directly about Loduca, I conclude that the government has established sufficient probable cause to support the extradition request of the government of Italy.

With respect to dual criminality, Article 2 of the extradition treaty between the United States and Italy provides that an offense is an extraditable one only if it is punishable under the laws of both countries. Article 2 goes on to state that any offense shall also be extraditable if it consists of an attempt to commit an offense punishable under the laws of both countries, and expressly concludes conspiracy and association offenses.

Loduca argues that his conviction for violating Article 416, I'm going to say Bis, but I don't know if that's correctly pronounced, B-i-s, does not meet this test. The [85] statute 416 Bis reads in part as follows: "Whoever is a member of an association of a mafia type consisting of 3 or more persons shall be punished." The statute goes on to say, "An association shall be of a mafia type when its members avail themselves of the power of intimidation and of the condition of subjection and conspiracy of silence,"—I take it the translation is less than perfect—"deriving therefrom for the purpose of committing crimes." Apparently 2 of the 19 years to which Loduca has been sentenced were imposed pursuant to this statute.

To the extent that the statute can be read to apply to members of an association who commit no wrongdoing, Loduca's point is well taken. However, to the extent that the statute is applied to those members who "avail themselves of the power of intimidation," stemming from their association to commit crimes, the statute is analogous to RICO, or conspiracy offenses that are well recognized here in the United States.

In addition, the extradition treaty expressly identifies "any type of association to commit offenses" as extraditable. The relevant inquiry in any event is not even the language of the statute, but the conduct for which the accused was prosecuted. See *Collins versus Loisel* (ph.), another word I'm not sure I'm pronouncing correctly, 295 US 309, a 1922 Supreme Court decision which is, despite its age, relied upon frequently in the subsequent case law governing [86] extradition. *Spitolo versus United States*, 741 F Sup 362 at 372, eastern district of New York 1990, which decision was affirmed, as noted above, at 925 F 2nd 615, Second Circuit 1991, and specifically with respect to this point at page 618.

Loduca's participation in the affairs of an association in fact, which engaged in a conspiracy to smuggle narcotics, is really quite analogous to *Rico*, and in my mind therefore satisfies Article 2 of the extradition treaty. Although Loduca's counsel argues to me that it cannot be discerned from the court decision upon which evidence the government of Italy relied in support of the 416 Bis conviction, the description of his criminal activity contained in the documents forwarded is that of someone who was a principal in a narcotics smuggling operation, and a natural inference to me is that it was his role as a principal and an active participant in that narcotics conspiracy that the court relied upon in finding the elements of 416 Bis were met.

For these reasons, I reject Mr. Loduca's challenges to extradition and I am prepared to certify the government

of Italy's request when the government presents the appropriate documentation to me.

MS. WARD: Your Honor, I have a draft order and certification.

THE COURT: Have you served it on opposing counsel?

MS. WARD: No, I haven't, because I didn't know what [87] Your Honor—

THE COURT: Why don't you do that now, and you can have a minute to look it over. Take as much time as you need, Counsel, because I'm reading it for the first time too.

* * * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-94-0792M

IN THE MATTER OF
EXTRADITION OF PAOLO LODUCA

August 25, 1994
Brooklyn, New York

TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING
BEFORE THE HONORABLE MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

* * * *

[2] THE CLERK: *United States versus Paolo Loduca,* CR-94-792. Please state your name for the record.

MR. ROSE: Charles E. Rose for the United States.

MR. BRONSON: Larry Bronson and James Froccaro on behalf of the defendant, Paolo Loduca.

MR. ROSE: Your Honor, Mr. Froccaro filed a memorandom which I did not receive. He filed it with the office yesterday. But it did not wind its way to me. And I saw it for the first time as I walked in here.

However, I think we essentially don't disagree on certain aspects. If we can set those out for Your Honor's consideration.

THE COURT: I'm happy to hear about agreements.

MR. ROSE: Oh, essentially, Mr. Loduca was the subject of a criminal investigation in the United States in the Southern District and in Miami several years ago.

He was not indicted in either district. He was charged in his native country. He is a citizen. But he was born in Italy. With drug trafficking and what they call mafia association, our equivalent to our racketeering act.

He was tried and convicted in absentia. And was sentenced originally to 25 years. I think that was originally 25 years. And I think that was subsequently reduced to 19 years.

I don't think we disagree with any of those facts. [3] The Republic of Italy requested his provisional arrest some time ago. A warrant was—was issued. And he was arrested based on that provisional arrest. So he's subject to be returned to Italy, where he has not lived for a long time, to face those charges.

The simple question today is whether he should be released pending extradition. We were in a provisional—and indeed, still are—in a provisional arrest stage. As I informed Mr. Bronson and Mr. Froccaro, the extradition documents arrived today, and on file by the end of the day. And copies have been made for both counsel.

So the stage we're in now is really not a provisional arrest, but a formal extradition request has been made. Generally speaking, in extradition matters, bail is not granted except in "special circumstances."

And that's a—from numerous court cases again, that we both agree with. What we have here is Mr. Loduca's proffer based upon the letters and documents that the condition of his wife is such a special circumstance.

I have no question that the condition as set forth in the letters is an accurate condition. Both counsel have represented to me that they have—there simply are no other family members that could fill in for Mr. Loduca in caring for his wife.

Again, I can't really address myself to that. And [4] the simple question is whether the court determines that the situation, as described, is a special circumstance

under the law. And I think we would agree that that is the determination.

MR. BRONSON: Except for one small factor which I would like to add, Your Honor. We've also agree, in our discussions, our preliminary discussions, that Mr. Loduca, since he has been aware of these charges since 1990, and since the Italian government made no steps to extradite him since the charges were levelled in 1990, and since the charges were originally filed in—in—well originally became public knowledge in Florida in 1987 and 1988. His name surfaced, that he was subject to an investigation.

Despite all of that, we've agreed among ourselves that he does not represent a flight risk because, despite having all that knowledge with respect to the proceedings in Italy and so forth, and the possibility of extradition to Italy during that seven year period, Mr. Loduca, who I might point out, who has been a citizen of the United States since 1965, has remained at the same residence in Sands Point, New York, for fourteen years.

And before that, he resided in Queens. During the entire time that Mr. Loduca has resided in the United States, he has always remained here in this metropolitan area.

So one of the key factors which we have pointed out [5] to you, which this court must consider under the case law as analyzed, is whether or not he's a risk of flight.

Now in order—because the policy of the United States government is to protect the interest of the foreign government in not allowing an individual to leave this jurisdiction, that is, this policy of detention is done so that an individual who is in one jurisdiction, one—one—

THE COURT: I understand that.

* * * *

APPENDIX F

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE III

Section 1. The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

ARTICLE II

Section 2, Clause 2.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

(As amended Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7087, 102 Stat. 4409; Nov. 29, 1990, Pub.L. 101-647, Title XVI, § 1605, 104 Stat. 4843.)

§ 3186. Secretary of State to surrender fugitive

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

(June 25, 1948, c. 645, 62 Stat. 824.)

9 Stat. 302

CHAP. CLXVII.—*An Act for giving Effect to certain Treaty Stipulations between this and foreign Governments, for the Apprehension and delivering up of certain Offenders.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government, it shall and may be lawful for any of the justices of the Supreme Court or judges of the several District Courts of the United States—and the judges of the several State courts, and the commissioners authorized so to do by any of the courts of the United States, are hereby severally vested with power, jurisdiction, and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention—to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made.

SEC. 2. *And be it further enacted,* That in every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.

SEC. 3. *And be it further enacted,* That it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person or persons authorized, as aforesaid, to hold such person in custody, and to take him or her to the territories of such foreign government, pursuant to such treaty; and if the person so accused shall escape out of any custody to which he or she shall be committed, or to which he or she shall be delivered, as aforesaid, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he or she shall so escape may be retaken, on an escape.

SEC. 4. *And be it further enacted,* That when any person who shall have been committed under this act, or any such treaty, as aforesaid, to remain until delivered up in pursuance of a requisition, as aforesaid, shall not be delivered up pursuant thereto, and conveyed out of the United States within two calendar months, after such commitment, over and above the time actually required to convey the prisoner from the gaol to which he or she may have been committed, by the readiest way, out of the United States, it shall, in every such case, be lawful for

any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shown to such judge why such discharge ought not to be ordered.

SEC. 5. *And be it further enacted,* That this act shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer.

SEC. 6. *And be it further enacted,* That it shall be lawful for the courts of the United States, or any of them, to authorize any person or persons to act as a commissioner or commissioners, under the provisions of this act; and the doings of such person or persons so authorized, in pursuance of the provisions aforesaid, shall be good and available to all intents and purposes whatever.

APPROVED, August 12, 1848.

TIAS 10837
ITALY
EXTRADITION

Treaty signed at Rome October 13, 1983;

Transmitted by the President of the United States of America to the Senate April 18, 1984 (Treaty Doc. No. 98-20, 98th Cong., 2d Sess.); Reported favorably by the Senate Committee on Foreign Relations June 20, 1984 (S. Ex. Rept. No. 98-33, 98th Cong., 2d Sess.); Advice and consent to ratification by the Senate June 28, 1984;

Ratified by the President August 10, 1984;
Ratified by Italy May 23, 1984;
Ratifications exchanged at Washington September 24, 1984;
Proclaimed by the President October 31, 1994;
Entered into force September 24, 1984.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

CONSIDERING THAT:

The Extradition Treaty between the Government of the United States of America and the Government of the Republic of Italy was signed at Rome on October 13, 1983, the text of which is hereto annexed;

The Senate of the United States of America by its resolution of June 28, 1984, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty;

The Treaty was ratified by the President of the United States of America on August 10, 1984, in pursuance of the advice and consent of the Senate, and was ratified on the part of the Republic of Italy;

It is provided in Article XXIV of the Treaty that the Treaty shall enter into force upon the exchange of instruments of ratification;

The instruments of ratification of the Treaty were exchanged at Washington on September 24, 1984, and accordingly the Treaty entered into force on September 24, 1984;

NOW, THEREFORE, I, Ronald Reagan, President of the United States of America, proclaim and make public the Treaty to the end that it be observed and fulfilled with good faith on and after September 24, 1984, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

(Seal)

DONE at the city of Washington this thirty-first day of October in the year of our Lord one thousand nine hundred eighty-four and of the Independence of the United States of America the two hundred ninth.

Ronald Reagan
By the President:
George P. Shultz
Secretary of State

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF ITALY

The Government of the United States of America and the Government of the Republic of Italy,

Recognizing their close cooperation in the repression of crimes;

Desiring to make such cooperation even more effective;

Seeking to conclude a new Treaty for the reciprocal extradition of offenders;

Have agreed as follows:

ARTICLE I

Obligation to Extradite

The Contracting Parties agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities of the Requesting Party have charged with or found guilty of an extraditable offense.

ARTICLE II

Extraditable Offenses

1. An offense, however denominated, shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty. When the request for extradition relates to a person who has been sentenced, extradition shall be granted only if the duration of the penalty still to be served amounts to at least six months.

2. An offense shall also be an extraditable offense if it consists of an attempt to commit, or participation in the commission of, an offense described in paragraph 1 of this Article. Any type of association to commit offenses

described in paragraph 1 of this Article, as provided by the laws of Italy, and conspiracy to commit an offense described in paragraph 1 of this Article, as provided by the laws of the United States, shall also be extraditable offenses.

3. When extradition has been granted for an extraditable offense, it shall also be granted for any other offense specified in the request even if the latter offense is punishable by less than one year's deprivation of liberty, provided that all other requirements for extradition are met.

4. The provisions of this Article apply whether or not the offense is one for which United States federal law requires proof of an element, such as interstate transportation, the use of the facilities of interstate commerce, or the effects upon such commerce, since such an element is required for the sole purpose of establishing the jurisdiction of United States federal courts.

ARTICLE III

Jurisdiction

When an offense has been committed outside the territory of the Requesting Party, the Requested Party shall have the power to grant extradition if its laws provide for the punishment of such an offense or if the person sought is a national of the Requesting Party.

ARTICLE IV

Extradition of Nationals

A Requested Party shall not decline to extradite a person because such a person is a national of the Requested Party.

ARTICLE V

Political and Military Offenses

1. Extradition shall not be granted when the offense for which extradition is requested is a political offense, or if the person whose surrender is sought proves that the request for surrender has been made in order to try or punish him or her for a political offense.

2. For the purpose of the application of paragraph 1 of this Article, an offense with respect to which both Contracting Parties have the obligation to submit for prosecution or to grant extradition pursuant to a multilateral international agreement, or an offense against the life, physical integrity or liberty of a Head of State or Government or a member of their respective families, or any attempt to commit such an offense, will be presumed to have the predominant character of a common crime when its consequences were or could have been grave. In determining the gravity of the offense and its consequences, the fact that the offense endangered public safety, harmed persons unrelated to the political purpose of the offender, or was committed with ruthlessness shall, in particular, be taken into account.

3. Extradition shall have be granted for offenses under military law which are not offenses under ordinary criminal law.

ARTICLE VI

Non Bis in Idem

Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same acts for which extradition is requested.

ARTICLE VII

Pending Proceedings for the Same Acts

Extradition may be refused if the person sought is being proceeded against by the Requested Party for the same acts for which extradition is requested.

ARTICLE VIII

Lapse of Time

Extradition shall not be granted when the prosecution, or the enforcement of the penalty, for the offense for which extradition has been requested has become barred by lapse of time under the laws of the Requesting Party.

ARTICLE IX

Capital Punishment

When the offense for which extradiction is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not provide for such punishment for that offense, extradition shall be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE X

Extradition Requests and Supporting Documents

1. Requests for extradition shall be made through the diplomatic channel.

2. All requests for extraditon shall be accompanied by:

(a) documents, statements or other information which set forth the identity and probable location of the person sought, with, if available, physical description, photographs and fingerprints;

(b) a brief statement of the facts of the case, including the time and location of the offense;

(c) the texts of the laws describing the essential elements and the designation of the offense for which extradition is requested;

(d) the texts of the laws describing the punishment for the offense; and

(e) the texts of the laws describing the time limit on the prosecution or the execution of the punishment for the offense.

3. A request for extradition which relates to a person who has not yet been convicted shall also be accompanied by:

(a) a certified copy of the arrest warrant or any order having similar effect;

(b) a summary of the facts of the case, of the relevant evidence and of the conclusions reached providing a reasonable basis to believe that the person sought committed the offense for which extradition is requested; in the case of requests from Italy such a summary shall be written by a magistrate, and in the case of requests from the United States it shall be written by the prosecutor and shall include a copy of the charge; and

(c) documents establishing that the person sought is the person to whom the arrest warrant or equivalent order refers.

4. A request for extradition which relates to a person who has been convicted shall, in addition to those items set forth in paragraph 2 of this Article, be accompanied by:

(a) a copy of the judgment of conviction, or, in the case of the United States, if the person has been found guilty but not yet sentenced, a statement by a judicial officer to that effect;

(b) if the penalty has been pronounced, a copy of the sentence and a statement as to the duration of the penalty still to be served; and

(c) documents establishing that the person sought is the person convicted.

5. If the person sought has been convicted in absentia or in contumacy, all issues relating to this aspect of the request shall be decided by the Executive Authority of the United States or the competent authorities of Italy. In such cases, the Requesting Party shall submit such documents as are described in paragraphs 2, 3 and 4 of this Article and a statement regarding the procedures, if any, that would be available to the person sought if he or she were extradited.

6. The documents which accompany an extradition request shall be made available in English and Italian by the Requesting Party.

7. The documents which accompany an extradition request shall be admissible into evidence when:

(a) in the case of a request from the United States, they are certified by a judge, magistrate or other United States official and are sealed by the Secretary of State;

(b) in the case of a request from Italy, they are signed by a judge or other Italian judicial authority and are certified by the principal diplomatic or consular officer of the United States in Italy.

ARTICLE XI

Additional Documentation

1. If the Requested Party considers that the documentation furnished in support of a request for extradition is incomplete or otherwise does not conform to the requirements of this Treaty, that Party shall request the sub-

mission of necessary additional documentation. The Requested Party shall set a reasonable time limit for the submission of such documentation, and shall grant a reasonable extension of that time limit upon an application by the Requesting Party setting forth the reasons requiring the extension.

2. If the person sought is in custody and the additional documentation submitted is incomplete or otherwise does not conform to the requirements of this Treaty, or if such documentation is not received within the period specified by the Requested Party, that person may be discharged from custody. Such discharge shall not prejudice the rearrest and the extradition of the person sought if a new request and the additional documentation are delivered at a later date.

ARTICLE XII

Provisional Arrest

1. In case of urgency, either Contracting Party may apply for the provisional arrest of any person charged or convicted of an extraditable offense. The application for provisional arrest shall be made either through the diplomatic channel or directly between the United States Department of Justice and the Italian Ministry of Grace and Justice, in which case the communication facilities of the International Criminal Police Organization (Interpol) may be used.

2. The application shall contain: a description of the person sought including, if available, the person's nationality; the probable location of that person; a brief statement of the facts of the case including, if posible, the time and location of the offense and the available evidence; a statement of the existence of a warrant of arrest, with the date it was issued and the name of the issuing court; a description of the type of offenses, a citation to the sections of law violated and the maximum penalty possible upon conviction, or a statement of the existence of a

judgment of conviction against that person, with the date of conviction, the name of the sentencing court and the sentence imposed, if any; and a statement that a formal request for extradition of the person sought will follow.

3. On receipt of the application, the Requested Party shall take the appropriate steps to secure the arrest of the person sought. The Requesting Party shall be promptly notified of the result of its application.

4. Provisional arrest shall be terminated if, within a period of 45 days after the apprehension of the person sought, the Executive Authority of the Requested Party has not received a formal request for extradition and the supporting documents required by Article X.

5. The termination of provisional arrest pursuant to paragraph 4 of this Article shall not prejudice the re-arrest and extradition of the person sought if the extradition request and the supporting documents are delivered at a later date.

ARTICLE XIII

Decision and Surrender

1. The Requested Party shall promptly communicate to the Requesting Party through the diplomatic channel its decision on the request for extradition.

2. The Requested Party shall provide reasons for any partial or complete rejection of the request for extradition and a copy of the court's decision, if any.

3. When an extradition request has been granted, the competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. If, however, that person is not removed from the territory of the Requested Party within the agreed time, that person may be set at liberty, unless a new date for surrender has been agreed upon.

ARTICLE XIV

Deferred Surrender and Temporary Surrender

After a decision on a request for extradition has been rendered in the case of a person who is being proceeded against or is serving a setnence in the Requested Party for a different offense, the Requested Party shall have the authority to:

(a) defer the surrender of the person sought until the conclusion of the proceedings against that person or the full execution of any punishment that may be or may have been imposed; or

(b) temporarily surrender the person sought to the Requesting Party solely for the purpose of prosecution. A person so surrendered shall be kept in custody while in the Requesting Party and shall be returned to the Requested Party at the conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement of the Contracting Parties.

ARTICLE XV

Requests for Extradition Made by Several States

The Executive Authority of the Requested Party, upon receiving requests from the other Contracting Party and from one or more other States for the extradition of the same person, either for the same offense or for different offenses, shall determine to which State it will extradite that person. In making its decision, the Executive Authority shall consider all relevant factors, including:

(a) the place in which the offense was committed;

(b) the gravity of the respective offenses, where the requesting States are requesting extradition for different offenses;

(c) the possibility of re-extradition between the requesting States; and

(d) the order in which the requests were received.

ARTICLE XVI

Rule of Speciality and Re-Extradition

1. A person extradited under this Treaty may not be detained, tried or punished in the Requesting Party except for:

(a) the offense for which extradition has been granted or when the same facts for which extradition was granted constitute a differently denominated offense which is extraditable;

(b) an offense committed after the surrender of the person;

(c) an offense for which the Executive Authority of the United States or the competent authorities of Italy consent to the person's detention, trial or punishment. For the purpose of this subparagraph, the Requested Party may require the submission of the documents called for in Article X.

2. A person extradited under this Treaty may not be extradited to a third State unless the surrendering Party consents.

3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial or punishment of an extradited person in accordance with the laws of the Requesting Party, or the extradition of that person to a third State, if:

(a) that person leaves the territory of the Requesting Party after extradition and voluntarily returns to it; or

(b) that person does not leave the territory of the Requesting Party within 30 days of the day on which that person is free to leave.

ARTICLE XVII

Simplified Extradition

If the person sought irrevocably agrees in writing to surrender to the Requesting Party after having been advised by a judge or competent magistrate of the right to formal proceedings and the protections afforded under this Treaty, the Requested Party may surrender the person without formal proceedings.

ARTICLE XVIII

Surrender of Articles, Instruments, Objects, and Documents

1. All articles, instruments, objects of value, documents and other evidence relating to the offense may be seized and surrendered to the Requesting Party. Such property may be surrendered even when extradition cannot be effected. The rights of third parties in such property shall be duly respected.

2. The Requested Party may condition the surrender of the property upon satisfactory assurance from the Requesting Party that the property will be returned to the Requested Party as soon as practicable, and may defer its surrender if it is needed as evidence in the Requested Party.

ARTICLE XIX

Transit

1. Either Contracting Party may authorize transit through its territory of a person surrendered to the other by a third State. The Contracting Party requesting transit shall provide the transit State, through the diplomatic channel, a request for transit which shall contain a description of the person and a brief statement of the facts of the case.

2. No authorization for transit shall be required when air transportation is used and no landing is scheduled in the territory of the Contracting Party. If an unscheduled landing occurs in the territory of that Contracting Party, it shall detain the person being transited not less than 96 hours while awaiting a request for transit pursuant to paragraph 1 of this Article.

ARTICLE XX

Assistance and Representation

The United States Department of Justice shall advise, assist and represent the Republic of Italy in any proceedings in the United States arising out of a request for extradition made by the Republic of Italy.

The Italian Ministry of Grace and Justice, through all means permitted by its legal system, shall advise, assist and provide for the representation of the United States of America in any proceedings in Italy arising out of a request for extradition made by the United States of America.

ARTICLE XXI

Expense

The Requesting Party shall pay the expenses related to the translation of documents and the transportation of the person sought from the city where confined to the Requesting Party. The Requested Party shall pay all other expenses related to the provision arrest, extradition request and proceedings. Any expenses related to transit under Article XIX shall be borne by the Requesting Party.

The Requested Party shall make no pecuniary claims against the Requesting Party arising out of the arrest, detention or surrender of persons sought under the terms of this Treaty.

ARTICLE XXII

Scope of Application

This Treaty shall apply to offenses committed before as well as after the date this Treaty enters into force.

ARTICLE XXIII

Denunciation

Either Contracting Party may terminate this Treaty at any time by giving written notice to the other Contracting Party. Termination shall be effective six months after the date of receipt of such notice.

ARTICLE XXIV

Ratification and Entry into Force

1. This Treaty shall be subject to ratification. The instruments of ratification shall be exchanged at Washington as soon as possible.

2. This Treaty shall enter into force immediately upon the exchange of the instruments of ratification.[1]

3. Upon the entry into force of this Treaty, the Treaty on Extradition between the United States of America and the Republic of Italy, signed at Rome on January 18, 1973,[2] and the Supplementary Protocol, signed at Rome on November 9, 1982,[3] shall cease to have effect; however, extradition proceedings pending in a Requested Party at the time this Treaty enters into force shall be subject to the prior Treaty, except that Article II of this Treaty should also be applicable to such proceedings. Article

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[1] Sept. 24, 1984.

[2] TIAS 8052; 26 UST 493.

[3] Not printed; never entered into force.

XIV of this Treaty shall also apply to persons found extraditable under the prior Treaty.

DONE at Rome, this thirteenth day of October, 1983, is duplicate in the English and Italian languages, both equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

/s/ William French Smith.

FOR THE GOVERNMENT OF THE REPUBIC OF ITALY

/s/ Nino Martinazzoli.

THE CONGRESSIONAL GLOBE

IN SENATE.

FRIDAY, *July* 28, 1848.

* * * *

FOREIGN CRIMINALS.

On motion of Mr. DAYTON, the Senate proceeded to consider the bill to carry into effect certain treaty stipulations between the United States and foreign Governments in relation to the apprehension of and delivering up of certain offenders.

The bill being under consideration as in Commitee of the Whole—

Mr. DAYTON referred to the existing treaties on the subject with Great Britain and France. A case had occurred under the former in which the fugitive was surrendered. A case had also occurred under the French treaty, in which Judge Betts, of New York, held a fugitive charged with forgery. By writ of habeas corpus, this case was brought to the United States Supreme Court, where it was refused to be considered, because Judge Betts heard the case in chambers, and the Supreme Court held it had no jurisdiction in the case. He stated that, under all the circumstances, this bill was reported, and he hoped it would be promptly passed.

Mr. HALE suggested that there was a defect in the bill, inasmuch as it brought citizens of the United States within the operation of the bill, and subjected them to be delivered up without form of trial. He had prepared an amendment, which he would move to introduce at the end of the bill.

Mr. DAYTON objected to the amendment as subjecting every criminal to a trial by jury before he shall be delivered up. If anything of this kind is desired, the treaty

ought to be amended. We are bound to carry out treaties as they stand.

Mr. HALE said he looked on these extraditional treaties with jealousy, and he thought the Senate ought to do so, especially in such times as these, when we may expect enough business of this kind on our hands. Suppose an individual denies that he is the person designated, and that most difficult question—the question of identity—should arise, it ought to be settled before the person is delivered up. The object of his amendment was to give the person an opportunity to prove his innocence. He called on the Senate to be careful not to lessen the securities for personal freedom.

Mr. KING said that the Senator from New Hampshire had taken a wrong view of the matter. This bill did not touch political offences. As to American citizens being taken in foreign countries for crimes, there was no danger that any would be wrongfully claimed by our Government. He stated the difficulties he had to encounter while in France in endeavoring to discover and arrest a fugitive from justice who had escaped into Switzerland. He was foiled in his efforts, and he then made a treaty with the Swiss Government which will render such arrests easy hereafter. But we ought not to expect foreign governments to lend us facilities, if we do not show a disposition to reciprocate.

Mr. BUTLER suggested the propriety of showing a becoming comity towards other nations; all being alike interested in the arrest of criminals who are seeking to escape from justice. He objected to the amendment moved by the Senator from New Hampshire.

Mr. HALE made some remarks in defence of his proposition. Those around him seemed to think that he desired to make this country a rogue's harbor. Quite the reverse. It was only by a trial by jury that rogues were brought to punishment. He referred again to the difficulties which perplexed questions of identity, and to the ruinous consequences to an individual from a false imputaton of crime.

Mr. BADGER thought that there was not only no good ground, but no reasonable apology for the indignant eloquence of the Senator from New Hampshire. His anger should have been directed against the treaty, not against the law which was necessary to carry it into operation. He stated that the treaties are especially guarded against including political offences. They had relation only to men who prey on society. He though it might be well to amend the bill, by inserting after the words "according to the terms," the words, "and true intent," of the treaty. We do not undertake to try foreign criminals, but merely, on such evidence as would justify his committal here for trial, to deliver up the individual.

Mr. DAYTON defended the bill, and assured the Senator from New Hampshire that no act we could pass would take away from American citizens the constitutional right of a trial by jury.

The amendment was then negitived.

Mr. BALDWIN moved to amend the bill, by striking out the words "justice of peace," and inserting in lieu thereof the words, "Justice of the Supreme Court, and judge of a district court."

Mr. BUTLER said, he thought it unnecessary, but he had no-particular objection to the amendment.

Mr. DAYTON said, that the language was in conformity with the treaty; but if his friend from Connecticut was tenacious about it, he had no objection.

The amendment was agreed to.

Mr. DAYTON modified the bill, by inserting the words "true intent and meaning," as suggested by the Senator from North Carolina, [Mr. BADGER.]

The bill was then reported to the Senate, the amendments were concurred in, and the bill was ordered to be read a third time, by the following vote—the yeas and nays being ordered at the call of Mr. HALE:

YEAS—Messrs. Badger, Baldwin, Bell, Borland, Bradbury, Butler, Calhoun, Clarke, Clayton, Davis of Mississippi, Dayton, Dickinson, Dix, Downs, Feich, Fitzgerald, Foote, Hamlin, Houston, Johnson of Louisiana, Johnson of Georgia, King, Lewis, Mangum, Metcalfe, Miller, Phelps, Sebastian, Sprance, Sturgeon, Underwood, Upham, and Walker—33.

NAYS—Messrs. Benton, Breese, Bright, Dodge, Hale, Hannegan, and Rusk—7.

The bill was then passed.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 95-1097 (RCL)

ANTHONY J. LOBUE and THOMAS C. KULEKOWSKIS,
Plaintiffs,

v.

WARREN N. CHRISTOPHER, SECRETARY OF STATE, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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* * * *

4. *The Extradition Judge Does Not Exercise Executive Authority.* The premise of plaintiffs' argument is that "in certifying extraditions under the extradition statute, federal extradition judges exercise either the executive or the judicial power of the United States" (Memo., p. 5). If it is executive power, plaintiffs continue, it infringes on constitutional separation of powers and violates the Appointments Clause (Memo., pp. 22-33). The immediate answer is that the extradition judge does not exercise "executive" authority as that concept is used in connection with separation of powers. E.g. *Morrison*, 487 U.S. at 681-682 & n. 20. In particular, the extradition statute does not direct the judicial officer either to "encroach[]

upon executive power" (*id.* at 682) or, as plaintiffs allege (Memo., p. 6), to act "in an extrajudicial capacity—to aid the Secretary of State in the execution of the laws."

Section 3184 functionally grants the extradition judge exactly the same judicial power that a judicial officer exercises with respect to authorizing an arrest or making a preliminary determination of probable cause. As is spelled out in the very opinion on which plaintiffs rely (Memo., p. 13),

> In distributing the duties arising from extradition treaties amongst the officers of the Government, *Congress has assigned the judicial duties of arrest and hearing upon the charge of crime to certain officers of the courts, leaving the further execution of the treaty, in case the party upon such hearing be deemed guilty under its provisions, to the Secretary of State.*

17 Op. Att'y Gen. 184, 185 (1881) (emphasis added). The opinion recognizes that the extradition statute assigns judicial duties to judicial officers, who exercise judicial powers in their execution. These judicial powers, moreover, are recognized as the same judicial powers exercised in authorizing arrests and finding probable cause.[9]

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[9] Plaintiffs construe the Opinion's description of the extraditing court's role "as a kind of helpful executive assistant" (Memo., p. 13). This characterization misreads the thrust of the Opinion itself, which specifically and repeatedly describes the court's function as "judicial" and directly compares it to the judicial role in authorizing criminal arrests and prosecution. The Opinion states in pertinent part:

> There can be no doubt that the treatment of such cases is intended to be merely *judicial* up to a certain point, and after that merely executive. Executive duties, however, as you suggest, require the exercise of discretion, and are generally not merely mandatory. In some cases it is not easy to say that this discretion differs substantially from the discretion which is confided to courts. The question here is, how far executive discretion extends in reviewing the judgment and testimony directed by the statute (Rev. Stats., sec. 5270) to be certified

It does not violate separation of powers principle when the executive branch exercises its discretion to decide whether to carry out a judicially-authorized search, bring criminal charges against a person arrested pursuant to a

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before you by the judicial officer who hears the charge in the first instance.

I am of the opinion that the proceedings below come before you upon a *quasi certiorari*, and that your discretion extends to a review of every question therein presented.

* * * *

It is difficult to see why the judicial officer should certify the *testimony* before him as well as his *judgment* thereon, unless for the purpose of affording an opportunity for a reconsideration of the effect of that testimony. * * * *

* * * [I]n sending the person charged before a judicial officer for hearing the legislature means only that he shall not be extradited *without* such an examination as in other criminal charges is required before holding for trial; but that the discretion of the executive (distinguishing this from the mere *ministerial* functions) usual in dealing with interests of persons or property, remains unaffected.

Upon the *requisition* being made for extradition, *the whole matter* comes before the Secretary, with the advantage that in a matter of local law, concerned in the case, he has had the assistance of a magistrate more or less expert therein.

The treaty requires that "the evidence of criminality" shall be such as, "*according to the laws of the place where the fugitive or person charged shall be found*, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

In a country like ours, where crimes in general are the subject of State and not Federal cognizance, the above provision for their hearing will render the conclusions thereupon by the magistrate of great value to the Secretary, who is hardly to be expected, even after an argument before him, to be as capable of administering the questions therein as accurately as has already been done. At least this would be so where the hearing below, as in the present case, was before a judge of superior jurisdiction.

* * * *

Upon the whole, repeating that very great respect is due to the decisions of the tribunal which hears the case in the

judicial warrant, or prosecute a person after a judge at a preliminary hearing has found probable cause. By the same token, it cannot violate separation of powers principles to commit to the extradition court the comparable threshold determination that an arrest and detention pending extradition is lawful, with the ultimate decision whether to effect the extradition committed to the discretion of the executive branch.

Plaintiffs' proposition (Memo., p. 15) that "the extradition judge does not exercise any part of the judicial power of the United States" is flawed. First, the sources upon which plaintiffs rely state that the extraditing judge's actions are not "part of what is *technically considered* the judicial power of the United States." E.g., *In re Mackin*, 668 F.2d at 127, quoting 10 Op. Att'y Gen. 501, 506 (1863); 6 Op. Att'y Gen. 91, 96 (1853) (emphasis added).[10] These same powers, however, are intrinsically exercises of judgment; as such, they are "judicial in their nature." *United States v. Ferreira*, 54 U.S. (13 How.) 39, 48 (1852).[11] It is clear that Section 3184 authorizes

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> first instance, especially under such circumstances as this presents, I am of opinion that the law gives to the party charged the double protection of a concurrence of views upon all questions affecting his guilt under the treaty by the magistrate and the Secretary before he is to be surrendered.

Id. at 185-187, emphasis in original.

[10] To the extent that plaintiffs rely on *Mackin* for the proposition that the extradition judge does not exercise "judicial" power, the Second Circuit's en banc decision in *In re McMullen*, 989 F.2d 603, 613 (1993) ("Congress has conferred jurisdiction upon the federal courts to conduct extradition proceedings"), which plaintiffs quote (Memo., p. 18), would call into question the *Mackin* statement.

[11] *Ferreira*, upon which plaintiffs seem heavily to rely (e.g., Memo., pp. 17, 18), is not an extradition case. It involves a statute that authorized courts to rule on applications made by Spanish soldiers and settlers for compensation pursuant to the treaty that ceded Florida to the United States. Under the statute the courts were authorized to act as non-judicial tribunals to rule on the

judges or magistrates at extradition hearings to be, at a minimum, "quasi judicial officers" empowered to act judicially. E.g. *In re United States*, 194 U.S. 194, 196 (1904); *Chin Bak Kan v. United States*, 186 U.S. 193, 200 (1902).

Nor does an extradition judge simply "give opinions in the nature of advice concerning [executive] action." *Muskrat v. United States*, 219 U.S. 346, 362 (1911). The extradition judge's certification follows an adversary proceeding; narrowly drawn and concrete issues, deemed essential to the invocation of judicial power, are plainly present, cf. *United States v. Freuhauf*, 365 U.S. 146, 157 (1961); and the judgment "bind[s] the rights of the parties litigating before it" (*Gordon v. United States*, 117 U.S. 697, 702 (1864)). Finally, if the judge refuses to certify extraditability, his decision is not "advisory" and the Secretary of State may not ignore it and order the extradition. In short, the extradition judge exercises the " 'judicial power' * * * 'to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' " *Muskrat, supra*, 219 U.S. at 356, internal citation omitted.

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applications for compensation and report their recommendations to the Secretary of the Treasury, who in turn was free to both grant and deny compensation in the face of a contrary recommendation. Ferreira applied for compensation, and a court found in his favor. On the government's attempt to appeal that decision, the Supreme Court dismissed the appeal, noting that the applicant's appearance for payment was not a "judicial proceeding" and the United States Attorney was not authorized to appear as a party; these factors contributed to its conclusion that the judges were not authorized to exercise "judicial power."

* * * *

Respectfully submitted,

JO ANN HARRIS
Assistant Attorney General
Criminal Division

ERIC H. HOLDER, JR.
DC Bar #303115
United States Attorney

JAMISON SELBY BOREK
Deputy Legal Adviser
United States Department of State

/s/ Sara Criscitelli
SARA CRISCITELLI
Assistant Director
Office of International Affairs
Criminal Division
U.S. Department of Justice
1400 New York Ave., N.W.
Washington, D.C. 20530
(202) 514-0040

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Supreme Court, U.S.
FILED
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CLERK

No. 96-426

In the Supreme Court of the United States

OCTOBER TERM, 1996

PAOLO LO DUCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

33 pp

QUESTION PRESENTED

Whether the federal extradition statute, 18 U.S.C. 3184 *et seq.*, as applied to petitioner, violates the separation of powers doctrine or the Appointments Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-426

PAOLO LO DUCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 93 F.3d 1100. The opinion of the district court (Pet. App. 26a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1996. The petition for a writ of certiorari was filed on September 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the federal extradition statute, 18 U.S.C. 3184 *et seq.*, are reproduced at Pet. App. 67a-68a.

STATEMENT

The Republic of Italy has asked the United States to extradite petitioner, who stands convicted of narcotics offenses under Italian law. In accordance with the federal extradition statute, 18 U.S.C. 3184 *et seq.*, the United

States has obtained a magistrate judge's certification that petitioner is subject to extradition under the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, Oct. 13, 1983, 35 U.S.T. 3023, T.I.A.S. No. 10837. Petitioner challenged his extradition by seeking a writ of habeas corpus from United States District Court for the Eastern District of New York. The district court denied petitioner's request for habeas corpus relief, and the court of appeals affirmed that decision. Petitioner seeks this Court's review based on his contention that the federal extradition statute, which has been in effect for nearly 150 years, violates the Constitution.

1. Extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other." *Terlinden* v. *Ames*, 184 U.S. 270, 289 (1902); 6 M. Whiteman, *Digest of International Law* 727 (1968). In the United States, extradition is a "national act" performed by the Executive Branch pursuant to treaties and Acts of Congress. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936); *In re Kaine*, 55 U.S. (14 How.) 103, 110 (1852) (plurality opinion). The President has power to surrender fugitives for extradition pursuant to a treaty as an incident of his treaty-making and foreign affairs powers under Article II of the Constitution. *Terlinden*, 184 U.S. at 289.

The United States entered into its first extradition agreement in 1794, as part of the Jay Treaty with Great Britain, Art. XXVII, 8 Stat. 129. See 1 J. Moore, *A Treatise on Extradition and Interstate Rendition* 89-90 (1891). Several years later, the Adams administration extradited a seaman named Jonathan Robbins to Great Britain to answer charges of mutiny. See *Kaine*, 55 U.S. (14 How.) at 111-112 (plurality opinion); R. Wedgwood, *The*

Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229 (1990). The Robbins extradition produced a public outcry based on the belief—which proved to be mistaken—that the President had surrendered Robbins to Great Britain without giving the judiciary an independent opportunity to pass on the legality of the extradition. *Kaine*, 55 U.S. (14 How.) at 112; see R. Wedgwood, 100 Yale L.J. at 286-287, 289-290, 292-304, 333-353.

The Jay Treaty expired in 1806, and the United States did not enter into another extradition treaty until 1842, when the United States and Great Britain signed the Webster-Ashburton Treaty, Aug. 9, 1842, 8 Stat. 572. The Robbins Affair had "a controlling influence" over the extradition terms of that treaty, *Kaine*, 55 U.S. (14 How.) at 112 (plurality opinion), by producing a general conviction that extradition without judicial oversight was "highly dangerous to liberty, and ought never to be allowed in this country." *Id.* at 113.

Unlike the Jay Treaty, the Webster-Ashburton Treaty expressly gave "judges and other magistrates" in both countries the "power, jurisdiction, and authority" to issue warrants for the arrest of fugitives and to hold hearings on "the evidence of criminality." Art. X, 8 Stat. 576. If a judge or magistrate found the evidence "sufficient to sustain the charge," the treaty directed the judicial officer to certify the determination to the proper executive official, "[so] that a warrant may issue for the surrender of [the] fugitive" to the requesting nation. *Ibid.* The treaty thereby ensured that a fugitive could not be surrendered for extradition without a prior determination by a judicial officer of the legality of the extradition.

Six years later, in 1848, Congress enacted the first federal extradition statute. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. The statute was intended "to enlarge the facilities to comply with our obligations" under the Webster-

Ashburton treaty and other extradition agreements. 18 Cong. Globe 868 (1848) (Rep. Ingersoll); accord *Kaine*, 55 U.S. (14 How.) at 109 (plurality opinion) (statute enacted "to secure the[] due execution" of extradition treaties). In particular, Congress sought to ensure that judicial officers would be available to issue warrants and conduct extradition hearings throughout the country, "at all times, without delay and the danger of a denial of justice." 18 Cong. Globe 868 (1848) (Rep. Ingersoll). To that end, the statute assigned authority over extradition proceedings to "any of the Justices of the Supreme Court or judges of the several District Courts," "the judges of the several State Courts," and "commissioners authorized * * * by any of the courts of the United States." 9 Stat. 302.

The extradition statute modeled the role of those judicial officers on the terms of the Webster-Ashburton Treaty. See *Kaine*, 55 U.S. (14 How.) at 110 (plurality opinion); compare 8 Stat. 576 (treaty) with 9 Stat. 302 (statute). The judicial process began with the filing of a complaint charging a fugitive with a crime covered by an applicable treaty. 9 Stat. 302. Upon the filing of the complaint, any judicial officer enumerated in the statute could issue a warrant for the fugitive's arrest. *Ibid.* Following the arrest, the judicial officer was authorized to hold a hearing to consider "the evidence of criminality." *Ibid.*; see *Kaine*, 55 U.S. (14 How.) at 114 (plurality opinion). If the judicial officer found the evidence "sufficient * * * to sustain the charge under the provisions of the proper treaty or convention," the statute directed him to issue a warrant for the fugitive's commitment pending surrender and to certify the extraditability determination to the Secretary of State, "together with a copy of all the testimony taken before him, * * * [so] that a warrant may issue * * * for the surrender" of the fugitive. 9 Stat. 302. Upon receipt of a certification of

extraditability, the Secretary of State was authorized "to order the person so committed to be delivered to" the requesting nation. *Ibid.*

The extradition statute enacted by Congress in 1848 has remained in effect, with minor changes, to the present day. See 18 U.S.C. 3184 *et seq.* The judicial procedures for arrest, hearing, certification, and commitment are now codified in 18 U.S.C. 3184. The judicial role currently may be exercised by "any justice" of this Court; any other federal judge; "any magistrate authorized so to do by a court of the United States"; or "any judge of a [state] court of record of general jurisdiction." *Ibid.*

The judicial role under the extradition statute parallels the established role of judges and magistrates in the arrest and commitment of persons charged with violating domestic criminal laws. As a plurality of the Court explained in its first decision applying the statute:

> Judges and State magistrates arrest and commit our own citizens, without exception, in all instances, and for every grade of crime and offense against our State and Federal laws; they determine on the rights of the prosecutor to commence the proceeding; on the sufficiency of the affidavit on which the warrant of arrest is founded; on the evidence of criminality after the arrest is made; and imprison or take bail preparatory to a trial in court. * * * Why, then, should a foreign criminal be more tenderly dealt by?

Kaine, 55 U.S. (14 How.) at 113-114 (plurality opinion).

The extradition hearing conducted under Section 3184 "is not * * * in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him." *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888); *Charlton* v. *Kelly*, 229 U.S. 447, 461 (1913). Instead, it "is essentially a preliminary examination to

determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation." *Ward* v. *Rutherford*, 921 F.2d 286, 287-288 (D.C. Cir. 1990) (Ginsburg, J.), cert. dismissed, 501 U.S. 1225 (1991). The judicial officer who conducts the hearing "thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense" pursuant to Federal Rule of Criminal Procedure 5.1. *Ibid.*[1]

If the judicial officer finds the evidence insufficient to hold a fugitive for extradition, the extradition complaint is dismissed. In that event, the Secretary of State has no authority to override the judicial decision by ordering the surrender of the fugitive. *In re Mackin*, 668 F.2d 122, 136 (2d Cir. 1981). A new extradition request may be filed, see *Collins* v. *Loisel*, 262 U.S. 426 (1923), but unless the judicial officer certifies that the fugitive is extraditable, extradition is not permitted. If the judicial officer does issue a certification of extraditability, the Secretary of State then decides "whether under all the circumstances affecting the case, both of a public and private nature, the warrant of surrender should issue." 6 M. Whiteman, *supra*, at 1027 (quoting 1912 Department of State legal memorandum). The Secretary of State has full discretion to decline to surrender the fugitive on some or all counts, or to set conditions on the surrender.[2]

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[1] The extradition statute does not provide for a judicial officer to order the Secretary of State to extradite an individual, any more than Rule 5.1 authorizes a judicial officer, upon finding probable cause, to order the government to prosecute. Instead, the judicial officer simply certifies that there is (or is not) a sufficient legal basis to hold the fugitive for surrender under the applicable extradition treaty.

[2] See, *e.g.*, *Escobedo* v. *United States*, 623 F.2d 1098, 1105 (5th Cir.), cert. denied, 449 U.S. 1036 (1980) and 450 U.S. 922 (1981); *Shapiro* v.

Because Section 3184 assigns extradition responsibilities to specific judicial officers, rather than to courts, the extradition rulings of federal judges and magistrates are not decisions of "district courts" within the meaning of 28 U.S.C. 1291. *Austin* v. *Healey*, 5 F.3d 598, 603-604 (2d Cir. 1993), cert. denied, 510 U.S. 1165 (1994); *Mackin*, 668 F.2d at 125-130 (Friendly, J.); *Jimenez* v. *Aristeguieta*, 290 F.2d 106, 107 (5th Cir. 1961). As a result, a judicial officer's certification of extraditability is not subject to appellate review. *Collins* v. *Miller*, 252 U.S. 364, 369 (1920). A fugitive may obtain further review through a petition for a writ of habeas corpus, *ibid.*, in which he may raise constitutional challenges and contest the jurisdiction of the extradition court, the validity and scope of the treaty, and whether the finding of extraditability is supported by probable cause. See *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925).

2. Petitioner is a naturalized American citizen who emigrated to the United States from Italy. In 1993, petitioner was convicted by an Italian court of participating in a conspiracy to ship cocaine from Colombia to Italy, in violation of specified provisions of the Italian Penal Code. Pet. App. 2a, 23a, 27a. The evidence introduced at petitioner's trial showed that petitioner was a member of the Sicilian Mafia and that he participated in narcotics

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Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974), aff'd on other grounds, 424 U.S. 614 (1976); 6 M. Whiteman, *supra*, at 1026-1028; 1 J. Moore, *supra*, at 555-570; Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313 (1962). The extradition statute preserves that discretion by providing that the Secretary "may," rather than "shall," issue a warrant surrendering the individual. 18 U.S.C. 3184, 3186. The Secretary has discretion, however, only in refusing to extradite. He may withhold surrender if the judicial officer issues a certification of extraditability, but he may not grant surrender if the judicial officer refuses to issue a certification.

trafficking from 1983 to 1988, including one shipment of more than half a ton of cocaine. *Ibid.* Petitioner, who was living in New York at the time of the trial and chose not to attend the trial, was represented in all phases of the proceedings by an Italian attorney. *Id.* at 27a.

In May 1994, in response to a request by the government of Italy, the United States filed an extradition complaint. Pet. App. 28a. A federal magistrate judge issued a warrant for petitioner's provisional arrest, and a different magistrate judge determined that petitioner was extraditable under the pertinent treaty. *Id.* at 28a-33a. Petitioner challenged that determination by filing a petition for a writ of habeas corpus in the district court. Applying a de novo standard of review, the district court ruled that none of petitioner's objections to extradition had merit. *Id.* at 34a-53a.[3]

On appeal, petitioner asserted for the first time that the federal extradition statute is unconstitutional. See Pet. App. 7a. Petitioner presented the court of appeals with two alternative, mutually exclusive sets of constitutional claims. See Pet. 3. One set of claims rested on the premise that judicial officers acting under the extradition statute are exercising "the judicial Power of the United States" under Article III. Starting from that premise, petitioner argued that the Secretary of State's authority to withhold surrender of a fugitive following a judicial certification of extraditability (see p. 6, *supra*) constitutes impermissible "executive revision" of the judgments of Article III courts. Starting from the same premise, petitioner further argued that extradition proceedings

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[3] Petitioner did not contest the constitutionality of the federal extradition statute in the proceedings before the magistrate judge or the district court, nor did he object to the assignment of the extradition hearing to a magistrate rather than an Article III judge.

must be conducted by Article III judges, rather than (as in petitioner's case) non-Article III magistrate judges.

The court of appeals rejected the premise of those claims. It held that judges and magistrates acting under the extradition statute are not exercising "judicial Power" in the Article III sense. Pet. App. 8a-15a. The court followed the past rulings of the First, Second, and Eleventh Circuits. See *Austin* v. *Healey*, 5 F.3d 598, 603 (2d Cir. 1993), cert. denied, 510 U.S. 1165 (1994); *In re Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993); *Martin* v. *Warden, Atlanta Penitentiary*, 993 F.2d 824, 828 (11th Cir. 1993). See also *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856) ("the act * * * of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial" in the "enlarged sense" that it "involve[s] the exercise of judgment upon law and fact," "[b]ut [that] is not sufficient to bring such matters under the judicial power" under Article III) (dictum). Having rejected petitioner's Article III premise, the court of appeals had no occasion to address further the claims that depended on that premise.

Petitioner's remaining claims assumed, as the court held, that the extradition tasks performed by judicial officers do not involve the exercise of "judicial power" in the Article III sense. Starting from that proposition, petitioner argued that those tasks cannot be assigned to Article III courts or judges. Petitioner further argued that the extradition statute violates the Appointments Clause by providing for federal judges to perform non-Article III tasks without a second appointment. The court of appeals agreed that, under this Court's precedents, "Congress may not expand the jurisdiction of federal courts beyond the limits established by Article III." Pet. App. 16a. The court held, however, that the extradition

statute does not violate that principle because it is not a grant of jurisdiction to the federal courts. Rather, the statute assigns extradition responsibilities to "individual justices, judges, and magistrate judges." *Id.* at 17a.

Turning to the claim that federal judges cannot be assigned non-Article III responsibilities, the court of appeals pointed out that petitioner's own extradition proceedings had been conducted by magistrate judges, who are not Article III officers and therefore are not subject to the constitutional limitations invoked by petitioner. Pet. App. 17a. The court further held that, in any event, the extradition statute satisfies the standards set forth in *Mistretta* v. *United States*, 488 U.S. 361 (1989), for the performance of non-Article III tasks by federal judges. Pet. App. 17a-20a. Finally, the court held that the statute does not violate the Appointments Clause because the tasks performed by judicial officers under the statute are germane to their Article III responsibilities. *Id.* at 20a-21a.

ARGUMENT

The court of appeals correctly rejected petitioner's challenge to the constitutionality of the federal extradition statute. The decision below is consistent with more than a century of authority validating the constitutionality of the statute and the appropriateness of its procedures. The court's decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner challenges extradition practices that were adopted by Congress more than a century ago, that have since been employed on thousands of occasions, and that have been uniformly recognized as constitutional. Those extradition practices have not only received long-standing judicial approval, but they are modeled after the

even more venerable and well-established relationship between judicial officers and the Executive Branch in the realm of domestic law enforcement. See *Charlton*, 229 U.S. at 461; *Benson*, 127 U.S. at 463; *Kaine*, 55 U.S. (14 How.) at 113-114 (plurality opinion).

When prosecutors wish to detain a suspect to answer criminal charges, they ordinarily must apply to a magistrate for an arrest warrant. If the warrant issues and the suspect is detained, he thereafter may obtain a preliminary hearing before a magistrate to determine whether "there is probable cause to believe that an offense has been committed and that the defendant committed it." Fed. R. Crim. P. 5.1(a); see *Jaben* v. *United States*, 381 U.S. 214, 224 (1965) ("a magistrate is intended to make a neutral judgment that resort to further criminal process is justified"). If the magistrate does not find probable cause, the criminal complaint is dismissed and the defendant is set free. See Fed. R. Crim. P. 5.1(b). If probable cause is found, the Executive Branch may proceed, but it retains the discretion not to go forward if it decides that prosecution is no longer advisable. To our knowledge, no court has ever suggested that those traditional procedures present any separation of powers concerns in the domestic law enforcement context.[4]

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[4] The absence of any dispute is unremarkable, for "[t]he ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). The role played by judicial officers in overseeing the arrest and commitment of criminal defendants is part and parcel of that constitutional enterprise, for it ensures that individuals are not detained to answer criminal charges unless a neutral and detached magistrate is satisfied with the legal and factual bases for the charges. The Executive Branch's discretion to discontinue a prosecution following the

The federal extradition statute employs those same procedures, and it is likewise constitutional. Indeed, before the enactment of the federal extradition statute, this Court had endorsed the use of such procedures in the extradition setting. See *In re Metzger*, 46 U.S. (5 How.) 175, 188-189 (1847) (Executive Branch "very properly" submitted extradition request to federal judge "at his chambers" to determine "[w]hether the crime charged is sufficiently proved, and comes within the treaty"; "[t]he arrest which followed, and the committal of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty."). And, with the exception of an aberrant district court decision that has since been vacated, every court that has addressed the issue has upheld the constitutionality of the federal law. See *United States* v. *Doherty*, 786 F.2d 491, 499 & nn.10-11 (2d Cir. 1986) (Friendly, J.); *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 555 (5th Cir. 1962); *Sandhu* v. *Bransom*, 932 F. Supp. 822 (N.D. Tex. 1996); *In re Extradition of Marzook*, 924 F. Supp. 565 (S.D.N.Y. 1996); *Werner* v. *Hickey*, 920 F. Supp. 1257 (M.D. Fla. 1996); *In re Extradition of Lin*, 915 F. Supp. 206 (D. Guam 1995); *In re Extradition of Lang*, 905 F. Supp. 1385 (C.D. Cal. 1995); *In re Extradition of Sutton*, 905 F. Supp. 631 (E.D. Mo. 1995); *Cherry* v. *Warden, Metropolitan Correctional Ctr.*, No. 95 Cr. Misc. 1 P.7(LB), 1995 WL 598986 (S.D.N.Y. Oct. 11, 1995); *Carreno* v. *Johnson*, 899 F. Supp. 624 (S.D. Fla. 1995).[5]

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finding of probable cause can work only to the benefit, and not to the detriment, of the defendant.

[5] In *Lobue* v. *Christopher*, 893 F. Supp. 65 (D.D.C. 1995), vacated, 82 F.3d 1081 (D.C. Cir. 1996), a district court held that the Secretary of State's authority to withhold surrender following a judicial certification of extraditability constitutes impermissible "executive revision." See 893 F. Supp. at 70-76. The D.C. Circuit vacated that decision on

2. As noted above, petitioner's constitutional objections to the extradition statute fall into two mutually exclusive categories—those that assume that judicial officers acting under the statute are not exercising the "judicial Power of the United States," and those that make the contrary assumption. The petition does not address which of those conflicting premises is correct, and it does not ask this Court to choose between them. Instead, petitioner argues that the statute is unconstitutional in either event. We agree that it is unnecessary to resolve the "judicial power" issue in order to dispose of this case, but for the opposite reason: Regardless of whether the extradition statute does or does not involve the exercise of Article III judicial power, the statute is constitutional.

a. Petitioner first claims (Pet. 6-12) that the extradition statute violates the separation of powers doctrine by vesting federal courts with jurisdiction over non-Article III controversies. As the court of appeals pointed out, however, the extradition statute does not purport to grant subject matter jurisdiction to the federal courts. Instead, by its terms, it assigns extradition responsibilities to specified judicial officers, including "any justice or judge of the United States," and "any magistrate authorized [to act] by a court of the United States." 18 U.S.C. 3184.

As a textual matter, the reference to "judge[s] of the United States" does not constitute a grant of jurisdiction to the district courts (or the courts of appeals), any more than the corresponding reference to "justice[s] * * * of the United States" constitutes a grant of original jurisdiction to this Court. See *Doherty*, 786 F.2d at 499 & nn.

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jurisdictional grounds. See 82 F.3d at 1082. Every court that has addressed the merits of the district court's reasoning in *Lobue* has rejected it. We address the "executive revision" theory at pp. 20-23, *infra*.

10-11 (Friendly, J.).[6] Because the statute does not purport to act as a jurisdictional grant, it does not conflict with the principle that "Congress [can]not expand the jurisdiction of the federal courts beyond the bounds of Article III." *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1128 (1996).[7]

Petitioner argues (Pet. 9-11) that the court of appeals' distinction between courts and judges turns Article III's jurisdictional limitations into a dead letter by allowing Congress to recast inappropriate grants of jurisdiction as assignments of power to individual judges. That assertion is incorrect. This Court has recognized that the Constitution imposes limitations on the power of Congress to assign Article III judges tasks apart from those specified in Article III. See, *e.g.*, *Mistretta*, 488 U.S. at 397-408.

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[6] If Congress's reference to "judge[s] of the United States" were read as a grant of jurisdiction to lower federal courts, then the reference to "justice[s] of the United States" would amount to a grant of original jurisdiction to this Court. But under *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), Congress cannot expand the original jurisdiction of this Court beyond that granted by Article III, and Article III does not vest this Court with original jurisdiction over extradition controversies. Petitioner's reading of the statutory language thus creates an independent constitutional problem that the Second Circuit's reading of the statute avoids.

[7] Contrary to petitioner's suggestion (Pet. 11), there is no conflict between the reasoning of the court of appeals and this Court's decision in *Metropolitan Washington Airports Auth.*, *supra*. The Court held in that case that Congress could not arrogate Article II functions to itself by assigning them to a commission whose membership was limited to members of Congress serving *ex officio*. 501 U.S. at 265-277. Looking to the structure and legislative history of the enabling statute, the Court concluded that the members of Congress appointed to the commission "act in their official congressional capacity" and constitute "a congressional agent" for separation of powers purposes. *Id.* at 267. The extradition statute does not present any analogous situation of one branch assigning the powers of another branch to itself.

Those limitations, which we discuss below, pp. 16-19, *infra*, ensure that Article III retains its vitality in defining the role of the federal judiciary.

Petitioner also argues (Pet. 6-8) that, purely as a matter of statutory construction, the extradition statute should be read as a jurisdictional provision. He bases that argument on the original language of the statute, which provided that the designated judicial officers were "vested with power, jurisdiction, and authority" to issue arrest warrants and hold extradition hearings. 9 Stat. 302. Petitioner argues that the quoted language, which no longer appears in the statute, expresses a grant of subject matter jurisdiction to the federal courts. According to petitioner, Congress selected the language specifically to overrule this Court's jurisdictional ruling in *In re Metzger*, in which the Court held that it lacked appellate jurisdiction over a district judge's extradition order because the matter "was heard and decided by the district judge at his chambers, and not in court." 46 U.S. (5 How.) at 191.

The courts have rejected petitioner's interpretation. *Mackin*, 668 F.2d at 125-127. Congress's use of the quoted language had nothing to do with a desire to grant jurisdiction or overrule *Metzger*. Instead, Congress was simply copying the terms of the Webster-Ashburton Treaty, which was drafted and ratified five years before *Metzger* was decided. As noted above, the Webster-Ashburton Treaty vested judges and magistrates in both countries with "power, jurisdiction, and authority" to issue warrants and hold extradition hearings. 8 Stat. 576 (1842). Congress added that language verbatim when it drafted the extradition statute. Its choice was unremarkable, because the statute was (in Congress's words) meant to "giv[e] Effect" to the Webster-Ashburton treaty and other extradition agreements. 9 Stat. 302. If Con-

gress had wished to enact a jurisdictional statute that would overrule *Metzger*, it would have used specific language expressing that intent and not treaty language drafted long before *Metzger* was decided.[8]

b. Petitioner claims (Pet. 12-13) that, even if the extradition statute is properly understood as an assignment of powers to individual judicial officers rather than a jurisdictional grant to federal courts, the statute is unconstitutional under the standards set forth in *Mistretta*. The court of appeals correctly rejected that claim. As the court of appeals pointed out, the claim fails at the outset because petitioner's own extradition proceedings were conducted by magistrates and not by an Article III judge. Pet. App. 17a. Accordingly, petitioner's claim is irrelevant to the constitutionality of his own extradition.[9]

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[8] Likewise, nothing in the legislative history of the statute reflects an intent on the part of Congress to change *Metzger*. As explained above, Congress acted primarily "to enlarge the facilities to comply with our [treaty] obligations," 18 Cong. Globe 868 (1848) (Rep. Ingersoll), by ensuring the general availability of judicial officers to conduct extradition proceedings (see pp. 3-4, *supra*). Although one of the bill's sponsors did refer in passing to *Metzger*, he nowhere suggested that the statute was intended to supersede that decision. 18 Cong. Globe 1008 (1848) (Sen. Dayton) (*reprinted at* Pet. App. 88a); see *Mackin*, 668 F.2d at 126 & n.7 (Friendly, J.) ("Nothing on the face of the statute or its legislative history shows an intention to alter the Supreme Court's ruling" in *Metzger*, and Senator Dayton "did not intimate that the bill would alter the result of that case.").

[9] While federal magistrate judges act as "adjuncts" to Article III courts, they themselves are not Article III officers. See, *e.g.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 79-80 (1982) (plurality opinion) (magistrates are "non-Art. III officers"); *Wingo* v. *Wedding*, 418 U.S. 461, 467 n.4 (1974) (magistrates are "outside the pale of Article III"); *Todd* v. *United States*, 158 U.S. 278, 283 (1895).

Moreover, even if petitioner's extradition proceedings had been conducted by an Article III judge, he still would not have a valid claim under *Mistretta*. Petitioner argues that *Mistretta* confines Article III judges to the performance of "non-adjudicatory" functions when they act outside the confines of Article III. See Pet. 12. In *Mistretta*, however, the non-adjudicatory nature of the Sentencing Commission was the source of the potential constitutional problem and not (as petitioner suggests) the solution. To resolve that issue, the Court turned to its general separation of powers inquiry, which "focus[es] on the extent to which a provision of law prevents [the affected] Branch from accomplishing its constitutionally assigned functions." 488 U.S. at 383 (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)) (internal punctuation omitted). In order to safeguard the constitutional role of Article III courts, this Court has articulated the "general principle * * * [that] executive or administrative functions *of a nonjudicial nature* may not be imposed on judges holding office under Art. III of the Constitution." 488 U.S. at 385 (emphasis added and internal quotation marks omitted). The Court in *Mistretta* analyzed whether the statute came within an "exception[] to this general rule," *id.* at 386, and found that it did. The extradition statute assigns judges tasks that are more conventionally "judicial" in nature. Hence, it follows that, even if *Mistretta* applies in this context, the extradition statute would also fall within the exception to the general rule.

Petitioner's argument also overlooks *Mistretta*'s analysis of *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852). See 488 U.S. at 403. *Ferreira* involved a statute that required a federal district judge in Florida to hear certain claims against the United States under a treaty with Spain. The judge's determinations were to be

reported to the Secretary of the Treasury, who would decide whether or not to pay the claims. This Court concluded in *Ferreira* that the powers conferred on the judge were "judicial in their nature," but were not part of the "judicial Power of the United States," 54 U.S. (13 How.) at 48, and hence not within the Court's appellate jurisdiction, because the judge's decisions were subject to revision by an Executive Branch officer.

In *Mistretta*, the Court took pains to point out that the underlying assignment to the district judge in *Ferreira* did not itself violate the separation of powers doctrine. See 488 U.S. at 403 ("[W]e expressed general agreement [in *Ferreira*] with the view * * * [that] such duties could be assigned to judges acting individually as commissioners."). As *Mistretta* explains, "*Ferreira* * * * suggests that Congress *may* authorize a federal judge, in an individual capacity, to perform an executive function without violating the separation of powers [doctrine]." *Ibid.* (emphasis added). Given that the district judge's role in *Ferreira* was, in this Court's words, "judicial in nature," 54 U.S. (13 How.) at 48, neither *Ferreira* nor *Mistretta* can be reconciled with petitioner's suggestion that Article III judges are limited to non-adjudicatory functions when they act outside the scope of Article III.

Petitioner also argues that *Mistretta* requires the exercise of non-Article III functions to be "voluntary" in the sense that the Article III judge may refuse to undertake them. *Mistretta*'s approval of the statute in *Ferreira* is at odds with a voluntariness requirement, for the district judge's exercise of the powers conferred in *Ferreira* was not voluntary; by its terms, the statute "*directed* [the judge] to receive and adjudicate" the claims. 9 Stat. 788 (emphasis added). In any event, as the court of appeals pointed out, the language of the extradition statute may readily be construed to give federal judges discretion over

whether to carry out the judicial functions provided under the statute. Pet. App. 19a; accord *Jimenez*, 311 F.2d at 555. Thus, even if voluntariness were a prerequisite under *Mistretta*, the extradition statute would satisfy that requirement.

Finally, petitioner asserts that judicial performance of a given non-Article III task is suspect under *Mistretta* to the extent that it "undermines public confidence in the disinterestedness of the Judicial Branch." *Mistretta*, 488 U.S. at 407. As the court of appeals pointed out (Pet. App. 19a-20a), however, federal judges have been carrying out their role under the extradition statute for nearly 150 years without "undermin[ing] public confidence" in the judiciary's disinterestedness.[10]

c. Petitioner asserts (Pet. 14-15) that if the extradition statute does not involve the exercise of "judicial Power" under Article III, then the statute violates the Appointments Clause by assigning non-Article III tasks to federal judges and magistrates without providing for a second appointment. As the court of appeals noted, however, an officer who has been appointed to an office in conformity with the Appointments Clause may thereafter be assigned additional functions, without the need for a second appointment, as long as the new functions are "germane" to those that the officer already performs. Pet. App. 20a-21a. See *Weiss* v. *United States*, 510 U.S. 163, 174 (1994); *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893). Here, as

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[10] There is nothing about the judicial role under the statute that would call into question the neutrality or disinterestedness of federal judges. To the contrary, judges acting under the statute perform their traditional role of protecting individuals against unlawful exercises of power by the Executive Branch. Judges traditionally have been given this kind of role precisely because they are neutral and disinterested, and that is why judicial officers play the same role under the extradition statute.

explained above, the duties performed by a judge or magistrate under the extradition statute are substantially the same as those performed by judges and magistrates in other preliminary criminal proceedings and are germane to the other functions assigned to federal judges and magistrates.[11]

3. Petitioner's remaining claims (Pet. 16-25) assume that the judicial role under the extradition statute involves the exercise of "judicial Power" under Article III. Because the court of appeals rejected that premise (Pet. App. 14a-15a), it did not have occasion to address those claims on their own terms. As we now show, those claims are without merit.

a. As noted above, the extradition statute vests the Secretary of State with discretion to withhold surrender of a fugitive after a judge or magistrate has certified that the fugitive is extraditable. See 18 U.S.C. 3184, 3186 (Secretary "may" surrender fugitive). According to petitioner, the Secretary of State's discretionary power to

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[11] There is another shortcoming to petitioner's Appointments Clause claim. The Appointments Clause precedents on which petitioner relies (Pet. 14-15) involve situations in which an officer of the United States is appointed to a second office, or is assigned additional powers that depart from the character of his existing office, *after* his original appointment. See *Mistretta*, 488 U.S. at 368 (sitting federal judges subsequently appointed to Sentencing Commission); *Ferreira*, 54 U.S. (13 How.) at 45-48 (sitting federal judge subsequent appointed to adjudicate foreign claims). Here, in contrast, the powers created by the extradition statute have been vested in federal judges and magistrates for nearly 150 years. Because extradition powers were part of the existing "job description" of federal judges and magistrates at the time that all current occupants of those offices were appointed, those powers were embraced in the original appointments. In some cases the Appointments Clause may require two appointments for two offices, but it can hardly be thought to require two appointments for one existing office.

withhold surrender turns the judge's or magistrate's extraditability ruling into a "nonbinding, unenforceable advisory opinion[]" (Pet. 16) and thereby violates Article III and the separation of powers doctrine under *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), and later decisions.

Petitioner's claim is without merit. As explained above (see pp. 11-12, *supra*), the relationship between judicial officers and the Executive Branch under the extradition statute is precisely the same as that in other preliminary criminal proceedings, such as probable cause hearings under Fed. R. Crim. P. 5.1. In each instance, the judicial officer protects individual liberty by determining whether it is lawful for the Executive Branch to proceed against the individual. If the judicial officer determines that probable cause has not been established, the Executive Branch may not go forward (unless it resubmits the matter to another judicial officer and obtains a favorable judicial determination). If the judicial officer instead determines that probable cause has been shown, the Executive Branch is authorized to proceed, but retains the discretion not to do so. The result is a "dual key" system in which the individual is protected by the separate exercise of distinct executive and judicial functions.

Petitioner does not suggest that this dual approval system violates Article III or the separation of powers doctrine when it is employed in other preliminary criminal proceedings, such as probable cause hearings under Rule 5.1. Indeed, separation of powers problems would arise if the Executive Branch were *denied* discretion in these matters and were compelled to execute a warrant that a reasonable officer believed was not backed by probable cause. In similar fashion, the government cannot be compelled to prosecute a case that it believes is not worthy of prosecution, regardless of whether a judicial officer determined that it was. See, *e.g.*, *United States* v. *Cox*, 342

F.2d 167, 171 (5th Cir.) (en banc) ("as an incident of the constitutional separation of powers, * * * the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions"), cert. denied, 381 U.S. 935 (1965); *Dacey* v. *Dorsey*, 568 F.2d 275, 277 (2d Cir.), cert. denied, 436 U.S. 906 (1978). If executive discretion in these matters does not turn prior judicial probable cause determinations into unconstitutional "advisory opinions," neither does the same kind of executive discretion under the extradition statute.

Petitioner insists (Pet. 16-17) that the extradition statute "requires federal judges to issue 'dead letter' judgments * * * without force or effect." That is incorrect. If a judge or magistrate declines to issue a certification of extraditability, the Secretary of State is foreclosed from surrendering the fugitive. See p. 6, *supra*. The government may file a new extradition request, but unless and until the renewed request leads to a certification of extraditability by a judicial officer, the government may not extradite the individual. As a result, judicial rulings under the extradition statute are binding in a way that was manifestly not true in *Hayburn's Case*, where the Executive Branch was free to revise or disregard judicial decisions in favor of military pension claimants.

At a deeper level, petitioner's claim ignores the basic logic of the separation of powers doctrine. The separation of powers protects individual liberty by ensuring that the distinct roles and functions of each branch are "safeguard[ed] against the encroachment or aggrandizement" of the other branches. *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976). The extradition statute does not present the risk of "encroachment or aggrandizement" that the separation of powers doctrine is designed to prevent. To the contrary, the statute's requirement that both judicial and

executive officers approve an extradition request points in precisely the opposite direction. Each branch involved in the extradition process has independent authority to block the surrender of a fugitive, and neither branch intrudes on the other when it exercises that authority. Instead, the dual approval mechanism maximizes the protection accorded to individuals. The statutory scheme is thus consistent, on the most fundamental level, with the values that lie at the heart of the separation of powers doctrine. See *Mistretta*, 488 U.S. at 381 ("the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch").

b. Petitioner also contends that responsibility for conducting extradition proceedings cannot, consistently with Article III, be assigned to federal magistrates. That claim has been addressed previously by two courts of appeals, both of which rejected it. *Ward*, 921 F.2d at 287-289 (Ginsburg, J.); *Austin*, 5 F.3d at 602-604. This Court denied a petition for a writ of certiorari in *Austin*, and there is no reason to follow a different course here.

Article III serves two distinct functions: first, "to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,'" and second, "to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986) (citation omitted). Petitioner's challenge to the role of magistrates does not invoke the latter, rights-protecting function of Article III. To the contrary, petitioner expressly told the court of appeals below that he was "*not* present[ing] * * * an Article III personal rights claim in this Court." C.A. Appellant Supp. Reply Br. 2 n.2 (emphasis added); cf. *Schor*, 478 U.S. at 848 ("as a personal

right, Article III's guarantee of an impartial and independent federal adjudicator is subject to waiver"). As a result, the only question presented in this case is whether the assignment of extradition powers to magistrates conflicts with the structural concerns of Article III.

The conduct of extradition proceedings by magistrate judges, like the conduct of warrant applications, probable cause hearings, and other preliminary criminal proceedings, does not threaten the judiciary's role vis-à-vis the other branches of government. The judiciary retains complete control over the participation of magistrates in the extradition process. As already noted, the extradition statute permits magistrates to conduct extradition proceedings only when they are "authorized so to do by a court of the United States." 18 U.S.C. 3184. Moreover, when a court chooses to commit an extradition proceeding to a magistrate, the magistrate's decision is "subject to habeas corpus review by an Article III judge, with appellate review available thereafter." *Ward*, 921 F.2d at 288. Because magistrates may perform extradition functions only with the leave of the federal courts, and because the essential features of their extradition decisions are subject to review by those courts, there is "no potential for trespass" on the independence of the judiciary by the other branches of the federal government. *Austin*, 5 F.3d at 604; *Ward*, 921 F.2d at 287.

The lengthy pedigree of the extradition statute offers further confirmation that Article III is not violated by the participation of magistrate judges in extradition proceedings. Commissioners, the predecessors of today's magistrates, were authorized to conduct extradition hearings from the inception of the extradition statute in 1848, and such officers have done so ever since. The historical acceptance of that practice, without any indication that it has generated interbranch friction, strongly suggests

that the practice does not raise structural concerns under Article III.

Petitioner asserts (Pet. 19-21) that the decision below conflicts with this Court's decisions in *Gomez* v. *United States*, 490 U.S. 858 (1989), and *United States* v. *Raddatz*, 447 U.S. 667 (1980). In *Gomez*, this Court held that the federal Magistrates Act does not authorize the delegation to magistrates of jury selection in felony trials. Because of the statutory basis for its decision, the Court expressly declined to decide whether Article III permits a magistrate to preside over jury selection. 490 U.S. at 872 n.25. As a purely statutory decision, *Gomez* is irrelevant to the constitutional claim presented here, and its statutory holding has no relevance to the extradition statute, which expressly authorizes the participation of magistrates in extradition proceedings.

This Court's earlier decision in *Raddatz*, far from helping petitioner, actually undermines his Article III claim. In *Raddatz*, this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion. The Court held that the delegation of suppression hearings to a magistrate "does not violate Article III so long as the ultimate decision is made by the district court." 447 U.S. at 683. The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. Here too, magistrates act under the authority of the district courts, and a magistrate's decision in an extradition hearing is subject to review by an Article III court in a habeas corpus proceeding. See also *id.* at 685 (Blackmun, J., concurring) (because magistrate is subject to control of Article III court, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes

from within, rather than without, the judicial department").

Petitioner also asserts that the decision below conflicts with the decisions of other courts of appeals regarding the permissible role of magistrates under Article III. None of the decisions cited by petitioner (Pet. 23-24) involves the role of magistrates under the extradition statute. Moreover, all but one of them are statutory decisions turning on the scope of the Magistrates Act, and are therefore inapposite for the same reasons that *Gomez* is. The remaining case, *United States* v. *Colacurcio*, 84 F.3d 326 (9th Cir. 1996), holds that a defendant's personal rights under Article III would be violated if his probation revocation hearing were conducted by a magistrate without his consent. *Id.* at 333-334. *Colacurcio* does not address the role of magistrates in extradition proceedings, and it rests on concerns about personal rights that petitioner has not raised in this case.[12]

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[12] Petitioner also asserts that the decision below conflicts with this Court's decision in *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). *Ng Fung Ho* holds that the Due Process Clause of the Fifth Amendment entitles a resident of the United States to a judicial determination of citizenship before the government can deport him as an alien. *Id.* at 284-285. In this case, petitioner never asserted a claim under the Due Process Clause. In any event, nothing in *Ng Fung Ho* casts doubt on the use of magistrates in extradition proceedings. See *Ward*, 921 F.2d at 288 n.4. Because a citizen cannot be deported, a deportation order constitutes a binding determination that a deportee is not a citizen. By contrast, a certification of extraditability does not divest the defendant of his citizenship; it merely constitutes a determination that there is sufficient evidence to warrant the individual's surrender to answer criminal charges abroad.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAOLO LODUCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY
MATTHEW J. HERRINGTON
WILLIAMS & CONNOLLY
725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

JAMES W. SHANNON, JR.
Crown Quadrangle, Rm. 132
Stanford, California 94305
(415) 723-2511

Attorneys for Petitioner Paolo DoDuca

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REPLY BRIEF FOR PETITIONER

1. The Opposition mirrors the confusion and inconsistency in the lower courts over the constitutional source of jurisdiction in extradition cases, when it claims that "it is unnecessary to resolve" whether extradition cases are conducted pursuant to Article I or Article III. Br. Opp. 13. Silence on that central question certainly forestalls the Opposition from having to endorse the Second Circuit's extraordinary answer, that Article III judges can adjudicate a case or controversy pursuant to Article I. That strategic silence, however, betrays a basic misunderstanding of our federalism: as courts of limited jurisdiction, federal courts must "presume that [they] lack jurisdiction." *Renne* v. *Geary*, 501 U.S. 312, 315 (1991). For that reason, federal courts have an unrelenting duty to inquire into "the first and fundamental question" of jurisdiction at every stage of the proceeding. *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986) (quotation omitted). Federal courts cannot discharge that duty by simply asserting, as the Opposition suggests, that they have jurisdiction under either Article I or Article III, whichever of those mutually exclusive bases a lower court might prefer.

2. The Opposition argues that the extradition statute, which expressly "vested . . . power, jurisdiction, and authority," A. 69a, nonetheless "does not purport to act as a jurisdictional grant" and "had nothing to do with a desire to grant jurisdiction." Br. Opp. 14, 15. But if Congress did not intend to do what it said it was doing—vest jurisdiction—what purpose did the extradition statute serve? The Opposition, quoting the statute's own title, says the statute was meant to "giv[e] Effect" to extradition treaties, Br. Opp. 15, but the Opposition never says why that was necessary. The answer, of course, is plain: a treaty alone cannot vest jurisdiction in federal courts; a specific statutory grant of jurisdiction is required.

The necessity of a statutory grant is apparent from *Metzger* and *Kaine*. Before the extradition statute was enacted, this Court did not have jurisdiction to review an extradition case. *In re Metzger*, 46 U.S. (5 How.) 176 (1847). After the statute was enacted, it did. *In re Kaine*, 55 U.S. (14 How.) 103 (1853); *see Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 100 (1868) ("in Kaine's case, all the judges, except one, asserted, directly or indirectly, the jurisdiction of this court to give relief"); Pet. Cert. 8-9.[1] Only a statute could fill the jurisdictional gap identified in *Metzger*, because only Congress has the power to set the subject-matter jurisdiction of inferior federal courts. As this Court held three years before the extradition statute was enacted,

> "the judicial power of the United States . . . [depends] entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent or exclusive."

Cary v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). This "rudimentary law" of federal courts, *Finley* v. *United States*, 490 U.S. 545, 548 (1989), was so well-entrenched at the time the extradition statute was enacted that this Court considered it "tedious and unnecessary" to enumerate all the cases that either "directly" or "tacitly" relied on it. *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448 (1850).

3. The Opposition suggests, without directly saying, that Article III judges may constitutionally adjudicate a case or controversy pursuant to Article I. Br. Opp. 17. If that startling claim were correct, Article III would be meaningless because its strictures could be evaded by the

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[1] The Opposition cites dicta in *In re Mackin*, 668 F.2d 122 (2d Cir. 1981), a decision that makes no mention of the crucial statutory language vesting "power, jurisdiction and authority" and that oddly suggests that the *Kaine* majority, which held that this Court had jurisdiction, was somehow in agreement with Justice Curtis' dissent on that point arguing that it did not. *Id.* at 126 n.8.

simple artifice of granting adjudicatory power to Article III judges in their individual capacity and not their official one. The Constitution bars such easy evasions: "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe of Florida* v. *Florida,* 116 S. Ct. 1114, 1132 (1996).

Rather than engage this constitutional principle, the Opposition relies entirely on an idiosyncratic reading of *Mistretta* v. *United States,* 488 U.S. 361 (1989)—a reading which implies that every adjudication, including those beyond the bounds of Article III, may be constitutionally assigned to Article III judges in their individual capacity. Br. Opp. 17-18. This reading of *Mistretta,* if it ever found life beyond the pages of the opposition, would surely explode the limitations of Article III. The only case cited in support of it is *United States* v. *Ferreira,* 54 U.S. (13 How.) 40 (1852), which involved the "executive function," *Mistretta,* 488 U.S. at 403, of adjusting treaty-based compensation claims. That function was "entirely alien to the legitimate functions of a judge or court" and was performed in a proceeding that was "altogether ex parte" with "no suit . . . no parties . . . no process." *Ferreira,* 54 U.S. at 51-52. *Ferreira* was an adjudication only in the broadest sense that it involved the exercise of "judgment and discretion." *Id.* at 49. But every "application of law to facts" is such an exercise, including the "[f]aithful execution" of the laws. Easterbrook, *Success and the Judicial Power,* 65 Ind. L. J. 277, 280 (1990). This Court has never approved of an adjudication by an Article III judge pursuant to any provision other than Article III, and *Ferreira* is no exception.

4. Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that a judgment *conclusively* resolves the case because a 'judicial Power' is one to render *dispositive* judgments." *Plaut* v. *Spendthrift Farm, Inc.,* 115 S. Ct. 1147, 1453 (1995) (em-

phasis added; quotations omitted). A judgment in an extradition case, however, has no res judicata effect, no matter how it is decided.

If the judge rules in favor of the requested person, as the Opposition concedes, the requesting state may file a new complaint that must be heard *de novo*, even if based on exactly the same evidence.[2] Br. Opp. 6. And if the judge rules for the requesting state, as the Opposition also concedes, the Secretary of State may still exercise the "full discretion," Br. Opp. 6, 21, given him by the extradition statute and refuse to extradite the requested person. "[T]he Secretary of State, acting for the President, could reach a conclusion contrary to that of the Supreme Court and act upon his conclusion." 4 Hackworth, *Digest of International Law*, § 338 at 189 (1942) (quoting Mem. of Asst. Legal Adviser, Jan. 4, 1934). Every branch of government agrees that the Secretary possesses such executive discretion to review and revise decisions in extradition cases. *See* Pet. Cert. 15.

5. Judgments ordering extradition are by statute merely "certif[ied]" to the Secretary of State, who is not bound by such judgments and who "may"—or may not—accept them. A. 69a. The grave constitutional problems posed by this executive revision convinced the Second Circuit to adopt what it thought was a constitutional, alternative construction of the extradition statute, holding that Article III judges can adjudicate a case or contro-

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[2] *See, e.g., United States* v. *Doherty*, 786 F.2d 491, 501 (2d Cir. 1986); *Hooker* v. *Klein*, 573 F.2d 1360, 1364 (9th Cir. 1978). The recent case of Ruiz Massieu, a former high-ranking official of the Mexican government, exemplifies the dead letter quality of a ruling in a requested person's favor. He won one extradition proceeding. *See In re Massieu*, No. 95-6012G-01 (D.N.J.) (Order of Dismissal, filed June 22, 1995). He was kept in prison while a second extradition request was prepared. He won again. *See In re Massieu*, No. 95-6082G-01 (D.N.J.) (Order of Dismissal, filed Sept. 25, 1995). He was kept in prison again while a third request was prepared. He won yet again. The government then sought to deport, not extradite, him.

versy pursuant to Article I. "[I]t is *dispositive*," said the Second Circuit in reaching its Article I construction of the statute, "that, since the decisions of extradition officers are subject to revision by the Secretary of State, those officers do not exercise judicial power within the meaning of Article III." A. 12a (emphasis added).

As the Second Circuit recognized, if construed as a grant of Article III adjudicatory power, the extradition statute is indistinguishable from those struck down in two of the most famous cases prohibiting advisory opinions. In *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), federal judges were authorized, as here, to "certify" a mixed question of law and fact—whether certain widows and orphans of Revolutionary War veterans "should be put on the pension list"—to the Secretary of War, who had full discretion to reject those certifications. Act of March 23, 1792, ch. 11, 1 Stat. 243, 244. Despite the Act's benevolent purposes, Chief Justice Jay and Justice Cushing, sitting as Circuit Justices, held the statute unconstitutional:

> it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

2 U.S. at 410 (emphasis in original).[3]

This Court similarly struck down the original jurisdictional statute of the Court of Claims. *Gordon* v. *United States*, 117 U.S. 697 (1865). The statute provided that federal courts would "certify their opinion [of the validity

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[3] The opinions reported in *Hayburn's Case* are binding precedent. *See Mistretta*, 488 U.S. at 402-03.

of claims] to the Secretary of the Treasury," who had the power to prevent payment unless and until "an appropriation therefor shall be estimated for" by him. *Gordon*, 117 U.S. at 698. In an unpublished decision, this Court held that the Executive power "to revise all the decisions of that court . . . denies to it the judicial power." *United States* v. *Jones*, 119 U.S. 477, 478 (1886).[4]

6. Under Article III, the Judiciary must have "the last word . . . with regard to a particular case or controversy." *Plaut*, 115 S. Ct. at 1457. After a hunt for any example, apart from extradition cases, in which the Judiciary does not in fact have the last word on the cases before it, the Opposition claims to have identified only one—an asserted executive "discretion to discontinue a prosecution." Br. Opp. 11 n.4, 21-22. That assertion is mystifying. Rule 48 of the Federal Rules of Criminal Procedure expressly says that the government "*may by leave of court* file a dismissal of an indictment, information or complaint." (emphasis added). It is hard to see how the government has the "last word," *Plaut*, 115 S. Ct. at 1457, in the dismissal of a prosecution when every such dismissal requires "leave of court."[5]

The cases cited by the Opposition address the *initiation* of a prosecution, not the termination of one after it has reached a federal court. *See United States* v. *Cox*, 342

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[4] *Gordon* is binding precedent. *See Williams* v. *United States*, 289 U.S. 553, 564 (1933).

[5] The history of Rule 48 further undermines the Opposition's claim. This Court refused to approve a draft of Rule 48 that gave the government "unqualified authority to *nolle prosse* a case without consent of the court." *United States* v. *Cowan*, 524 F.2d 504, 510 (5th Cir. 1975). Citing *Young* v. *United States*, 315 U.S. 257-259 (1942), and the concern expressed there regarding the proper "performance of the judicial function" in the dismissal of criminal cases, this Court re-wrote the draft Rule to require "leave of court" for all dismissals. *Cowan*, 524 F.2d at 512-13; *see United States* v. *Abreu*, 747 F. Supp. 493, 502 (N.D.Ind. 1990) (court is not a "rubber stamp" and determining "sound basis" for dismissal of indictment is "more than a rare ministerial administrative act; a judicial determination is sought").

F.2d 167 (5th Cir. 1965); *Dacey* v. *Dorsey*, 568 F.2d 275 (2d Cir. 1978). As the Fifth Circuit explained, "ours is not a *Cox* case. *Cox* involved a challenge to the power of the court to direct the *commencement* of a prosecution under Rule 7(c). We are concerned with the power of the court to supervise the *termination* of a prosecution under Rule 48(a)." *United States* v. *Cowan*, 524 F.2d 504, 509 (5th Cir. 1975) (emphasis added). The Opposition cites no case in which the government has dismissed an on-going prosecution without first seeking leave of court under Rule 48.

7. The Opposition suggests that an extradition hearing is the same as a preliminary hearing under Fed. R. Crim. P. 5.1. *See* Br. Opp. 11, 21. The Opposition overlooks a crucial difference: a preliminary ruling is "preliminary" precisely because—unlike an extradition judgment—it is always subject to additional review by the court before a final judgment is issued. And the ruling is subject to further review on direct appeal from that final decision.

The strictures of Article III do not apply to such preliminary rulings because, within the Judiciary's own hierarchy, "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." *Plaut*, 115 S. Ct. at 1457. The limitations of Article III are limitations on the Judiciary as a co-equal branch of government; and they require that the ultimate judgment to be rendered remain within the control of the Judicial Branch. Article III, § 1 vests "the judicial Power" exclusively in the Judiciary—which is "not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.'" *Plaut*, 115 S. Ct. at 1457 (emphasis original). It is thus only when "a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy," *id.*, that the strictures of Article III apply. That "last word," *id.*, must be final and conclusive between the parties—as it plainly is in criminal cases, and just as plainly is not in extradition cases.

8. The Opposition concedes the obvious—that "federal magistrate judges act as 'adjuncts' to Article III courts" in extradition proceedings. Br. Opp. 16 n.9. *See Grin* v. *Shine*, 187 U.S. 181, 187 (1902); Pet. Cert. 18. But the Opposition then suggests that petitioner's Article III challenges to the extradition statute are somehow "irrelevant to the constitutionality of his own extradition," simply because the district court's Local Rules automatically assigned petitioner's extradition case to a magistrate and not to an Article III judge. Br. Opp. 16. The Opposition does not press this curious logic, and it unravels under the barest scrutiny.

As adjuncts, magistrates are "assistants" to the district court, *Peretz* v. *United States*, 501 U.S. 923, 939 (1991), meant to "handle subsidiary matters." *Gomez* v. *United States*, 490 U.S. 858, 872 (1989).[6] An assistant, whose power is derivative of the district court, can exercise no power other than that possessed by the district court. Exercising, even if derivatively, the power of an Article III court, magistrates in extradition cases are bound by the strictures of Article III: like bankruptcy judges, they have no "existence independent of the Article III district court and cannot have powers, statutory or inherent, that are not derivative of the court of which [they are] a unit." Bartell, *Contempt of the Bankruptcy Court—A New Look*, 1996 U. Ill. L. Rev. 1, 28.

9. The Opposition's assertion that the "judiciary retains complete control over the participation of magistrates in the extradition process," Br. Opp. 24, is fantasy. The fact, of course, is that the magistrate in an extradition proceeding *is not supervised at all.* The magistrate in petitioner's case acted entirely on his own. He heard all

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[6] *See* S. Rep. No. 96-74, p. 3 (1979) (1979 amendments to Federal Magistrates Act); H.R. Rep. No. 94-1609, pp. 6-7 (1976) (same); S. Rep. 94-625, p. 6 (1976) (same); S. Rep. No. 90-371, p. 9 (1967) (same).

the evidence; evaluated all the witnesses; and made all the rulings. He decided the case and issued his judgment without any judicial participation. His judgment was not subject to review by direct appeal; and the habeas review actually afforded applied an "any evidence" standard of review.[7] That situation is the farthest cry imaginable from that approved in *United States* v. *Raddatz*, in which the magistrate was tightly confined to making recommendations as to certain non-dispositive motions, and then only when "the entire process takes place under the district court's total control and jurisdiction" and only "so long as the ultimate decision is made by the district court." 447 U.S. 683, 681 (1980).

This Court has regularly emphasized that the exercise of judicial power by magistrates raises core constitutional concerns. *Id.* at 681; *Peretz*, 501 U.S. at 929-30, 937-39; *Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850-51 (1986); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982) (plurality) ("The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III"). Article III and Due Process are violated where, as in extradition cases, magistrates act as substitutes for federal courts, and not as adjuncts to those courts and under their genuine control and supervision.[8]

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[7] *See Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925). The "any evidence" standard is even less searching than the clear error review rejected as constitutionally insufficient in *Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 852-53 (1986). Most decisions by magistrates are subject to *de novo* review. *See United States* v. *Raddatz*, 447 U.S. 667, 681 (1980).

[8] The Opposition wrongly claims that petitioner did not raise a due process claim before the Second Circuit. Br. Opp. 26 n.12. He did, and cited *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922), to make the point. *See* C.A. Appellant Supp. Br. 40-41.

10. Declaring the extradition statute unconstitutional will not disrupt treaty obligations or require remedial legislation: extradition proceedings are civil actions that could proceed under 28 U.S.C. § 1331 in the district court. A general jurisdictional grant surely applies where a specific jurisdictional grant such as the extradition statute has been declared unconstitutional. The difference, of course, is that extradition cases would then be decided in accordance with Article III, and not in defiance of it.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY
MATTHEW J. HERRINGTON
WILLIAMS & CONNOLLY
725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

JAMES W. SHANNON, JR.
Crown Quadrangle, Rm. 132
Stanford, California 94305
(415) 723-2511
Attorneys for Petitioner
Paolo DoDuca

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